228 e 28

A

TREATISE

OF

Common Recoveries,

THEIR

NATURE and USE.

To which is added

The CASE of PAGE and HAYWARD more fully Reported than in any other Book extant:

AND ALSO

A CASE between the late Earl of DERBY and the Coheirs of his Elder Brother.

With *Precedents* for amending *Fines* and *Recoveries*:

And a Complete TABLE to the Whole.

By N. PIGOTT, Esq; late a Barrister of the INNER TEMPLE.

The Second EDITION; wherein the Text and the Table are revised and corrected: In the Margin are added Notes and References, with some Cases which have been adjudged since the Author wrote. By a SERJEANT AT LAW.

Non mihi Soli Laboravi, sed omnibus
Exquirentibus Scientiam.

LONDON: Printed by his Majesty's Law-Printers;
For J. WORRALL and B. TOVEY, in Bell Yard; and P. URIEL, at the Inner Temple Gate, both near Temple Bar. 1770.

A

TREATISE

OF

Common Accidents,

IN THEIR

NATURE and USE.

To which is added

The CASE of PAGE and HAYWARD more fully Reported than in any other Book extant.

ALSO A SHORT Discourse between the Sure Trail of Detection and the Cobeirs of his Fellow Brother.

With Precedents for drawing Pleas and Pleading.

And a Compleat TABLE to the whole.



BOOKS lately publiſhed.

In QUARTO.

ANtient Dialogue concerning the Exchequer publiſhed from the RED BOOK, and BLACK BOOK of Record in his Majeſty's Exchequer. Containing an Account of the greateſt Officers, their Salaries, Privileges and Exemptions, *&c.* By Thomas Madox, Eſq; never before publiſhed in Engliſh, and very proper to be Bound with his Hiſtory of the Exchequer, publiſhed in 2 Vols. 4to.

Statutes at Large, reviſed by Owen Ruffhead, Eſq;

Barrington's Obſervations on the Antient Statutes, 3d Edition.

Blackſtone's Commentaries on the Laws of England, 4 Vols.

Fitzherbert's New Natura Brevium, with Notes by Sir Matthew Hale, and the Writs tranſlated by an able Hand.

OCTAVO.

Richardſon's Attorney's Practice in the Courts of King's Bench and Common Pleas, or an Introduction to the Knowledge and Practice of the ſaid Courts, as it now ſtands under the Regulation of ſeveral Acts of Parliament, Rules and Determinations of the ſame Courts, with Variety of Precedents in Engliſh, 4 Volumes. 5th Edition corrected and improved.

A

TREATISE

OF

Common Recoveries.

CAPUT I.

† Of the Origin, ‡ Nature and Uſe of Common Recoveries.

† This head is largely diſcuſſed in 1 Burro. 115. in the Caſe of Taylor on the Demiſe of *Atkyns* Eſq; v. *Horde* Eſq; and Others.

‡ Nature and Uſe] A Common Recovery with *ſingle Voucher* is to bar the Tenant in Tail and his Heirs, only of ſuch Eſtate Tail which is in his Poſſeſſion (not where he is put to a Right) with the Remainder dependant thereupon

A Common Recovery is a certain Form or Courſe allow'd by Law to be obſerved for the better Aſſurance of Lands, and generally uſed for the

Definition of a Common Recovery. Shep. Touch. 37. Doct. and Stud. Dial. 1. Cap. 26.

the barring Eſtates Tail, Remainders and Reverſions. I cannot ſay this is *an exact logical Definition, but rather a Deſcription, as all legal Definitions are, for *omnis definitio in Lege periculoſa.*

*P. 2

Common Recoveries being now generally uſed to bar Eſtates Tail, it may not be amiſs to look into the Origin of Eſtates Tail, which our Anceſtors have been ſo fond of, and which by Experience have been found to have created many Inconveniences to the Commonwealth.

The Origin of Eſtates Tail.

Littleton tells us, that an Eſtate Tail is a limited Eſtate, wherein the Donor in his Gift expreſſes what ſort of Heirs ſhall inherit; ſo the Law co-operating with the Donor's Intention, makes the Eſtate Tail.

upon, and the Reverſion expectant which others have; and of all Leaſes and Incumbrances derived out of ſuch Remainder or Reverſion. A Common Recovery with *double Voucher* is to bar the firſt Vouchee and his Heirs of every ſuch Eſtate as at any Time was in him or any of his Anceſtors whoſe Heir he is of ſuch Eſtate; and all others of ſuch Right to Remainder or Reverſion as was at any Time dependant or expectant upon the ſame; and of all Leaſes and Incumbrances derived out of them; and it will alſo be a Bar of ſuch Eſtate whereof the Tenant to the *Præcipe* was then ſeiſed, in Reverſion or Remainder expectant or dependant upon the ſame. See 3 Rep. 5. 10 Rep. 37. 2 Rol. Abr. 204. Skin. 63.

The Recovery with *treble Voucher* is uſed to make a perpetual Bar of the Eſtate whereof the Tenant was ſeiſed, and of every ſuch Eſtate of Inheritance as at any Time had been in the firſt or ſecond Vouchee, or their Anceſtors whoſe Heirs they are, and as well of every Reverſion thereon depending, as alſo of all Leaſes, Eſtates, Charges, and Incumbrances derived out of any Reverſion or Remainder.

Tail. Theſe Eſtates are not, by this Name found in any ancient Writers; for the Law of the twelve Tables makes no Mention of them, yet that Law calls the *Agnati* to inherit; and in the *Media Juris-prudentia* there were Inſtitutions and Subſtitutions like our Remainders; and the Civil Law *had a greater Regard to the Male than Female Line, till the Emperor *Juſtinian*, in his Novels, put both on an equal Footing. *P. 3

The *Jewiſh* Law, which is the moſt antient written Law, takes no Notice of theſe Sorts of Eſtates: Indeed the Daughter of *Zetophe* had, on the Failure of Iſſue Male of their Family, claimed the Inheritance which ſhews, as long as there were Sons, the Daughters did not inherit; but the Succeſſion among the *Jews* was generally the ſame as the antient *Romans*. It is therefore to be inquired, if theſe Eſtates Tail had not their Origin from the Feodal Law: And it is probable they had; ſince that Law admits no Female Succeſſion, I mean in its Purity, before the *Feodum Feminium* was intro-

duced; and by that Law, as uſed in *England*, the eldeſt Son took the Eſtate, and it always went according to the Tenor of the Inveſtiture or Grant, which is the
*P. 4 *very ſame as our Eſtates Tail, where the *Voluntas Donatoris*, is the Rule and Meaſure of the Eſtate; and as the Conqueror introduced Military Services into this Kingdom, which aroſe from the Feodal Law which was in Uſe in *Normandy*, long before the Conqueſt; ſo this inſenſibly carried the Eſtate to the eldeſt Son, and occaſioned the Statute of Entails: For before the Conqueſt, by the *Britiſh* Law, all the Sons inherited, and ſo was the Law in *Wales* in *Edward* the Firſt's Time. *Nam aliter uſitatum eſt in* Wallia *quam in* Anglia *quoad Succeſſionem hereditatis, eo quod hereditas in* Wallia *partibilis ſit int' heredes Maſculos.* And my Lord *Hale* is of Opinion, that till King *John*'s Time, the hereditary Succeſſion to the eldeſt Son, was not ſettled. But this muſt be underſtood of Socage Land; for from the Conqueror's Time, the Feodal Tenures of Knights-Service

were

were introduced, and there the eldest Son * inherited; and this held till the Statute *De Donis*, when the Lords and great Men being fond of perpetuating their Names, and handing down their Estates to their Families, by that Statute, created these Estates Tail.

* P. 5

At Common Law all Estates were Fee-simple, Absolute or † Conditional, which created a wonderful Quiet and Repose to the Publick; but when this Family-Law was introduced, and these fetter'd Inheritances establish'd, it is not to be imagin'd what Suits, Troubles and Disputes they created; as indeed it always happens when the Grounds of the antient Common Law of this Kingdom are alter'd. And the Reason is obvious, for the Common Law of *England* having its Force from immemorial Custom; and, as my Lord *Coke* observes, being refined by the Experience of many Ages, its Goodness is found by its Use; but when this excellent Constitution is alter'd by a * positive Law, though the Change has a gay Outside, yet Time shews the Inconveniences

† A *Fee Tail* was at Common Law known by the Name of a *Fee Conditional*, so called from the Condition expressed or implyed in the Gift or constitution of the *Fee*, that in Case the Donee died without such particular Heirs, the Land or *Fee* should *revert* to the Donor. But notwithstanding such Limitation or Restriction was agreeable to the Nature of *Feuds*, and

* P. 6

veniences of the Alteration; and the Legiſlature having only a preſent Conveniency in View, the new Law, when uſed, manifeſts that what was intended profitable, proves often Deſtructive, and ſo it fell out in making the Statute of *Donis*, which created Eſtates Tail, turning all thoſe Eſtates which were Feeſimple at Common Law, into thoſe curtail'd Eſtates, which being of an amphibious Nature, and participating ſo much of a Fee as to be Inheritances, and yet Tenant in Tail in ſome Reſpects, having only an Eſtate for Life, this odd Mixture created infinite Difficulties, not foreſeen but experimentally found to be very troubleſome to the Quiet of the State.

the Condition itſelf no other than (whether expreſſed or not) was implyed in every ſuch Gift; yet our Anceſtors were, after Heir or Iſſue had, ſuffered at Common Law to aliene ſuch *Fee*, and to defeat the Donor as well as the Heir, upon a Suppoſition that the Condition was for this Purpoſe ſatisfied or performed by the Donee's having Iſſue: This Notion and the conſequent Practice, being manifeſtly contrary to the Form and Intent of the Gift, was therefore reformed by the Statute of *Weſtm.* 2. *Cap.* 1. (commonly called the Statute *de Donis*) which required that from thenceforth the *Will* and the Intent of the Donor ſhould be obſerved, and that a *Fee* ſo given ſhould in all Events go to the Iſſue, and for want of Iſſue, revert to the Donor: So that though *Littleton* ſays, that a Fee Tail is by Force of this Statute; for that before, all Inheritances were *Fees* Simple, Abſolute or Conditional; yet it is certain, that this Statute did not create any new *Fee*, *aut re aut nomine*, but that it only ſevered and diſtinguiſhed the *Limitation* from the *Condition*, and reſtored the Effect of each, that is to ſay, the Effect of the *Limitation* to the Iſſue, and the Reverſion as the proper Effect of the *Condition* to the Donor, according to the plain Import and manifeſt Intent of the Gift: And yet, as by Means of this Statute the *Limitation* was raiſed above the *Condition*, the *Fee* might thenceforth be denominated from the *Limitation*, which as now eſtabliſhed, was become the Subſtance, as it was in Truth, before, the immediate End of the Gift. Wright's Tenures 186, 187, *&c.*

Theſe

Theſe Eſtates being thus made by the Statute of *Weſtminſter* the 2d, had various Fates, every Age looking on them with a different Aſpect. 5 *Ed.* 3. 14. * They were by *Herle* ſaid to be ſage Gen- * P. 7
tlemen that made this Act; and tho' the Statute *De modo levandi Fines*, was a moſt excellent Law, yet the Statute of *Weſtm.* 2. having provided *Quod Finis ipſo Jure ſit nullus*, the Judges conſtrued a Fine levied by Tenant in Tail a Diſcontinuance, but no Bar; ſo that for 200 Years theſe Eſtates were favour'd; and the Nobility being always fond of this Act, by Reaſon it preſerved their Eſtates for their Family againſt Forfeiture, even of Felony and Treaſon, there was no Hopes of getting it repealed by the Legiſlature; and therefore the Judges were forced to uſe their Art, by Conſtruction to avoid this Act, and remedy the intolerable Inconveniences introduced by it. *Vide Moore* 156.

It is true, *prætoris eſt Jus dicere non Condere*, and this altering the Law, and evading the Statute of *Weſtm.* 2. ſeems to

*P. 8 to be a taking away the Force of a * poſitive Law without the Legiſlative Power; but Uſe and Cuſtom have given Common Recoveries a Sanction, and the Judges will not now let them be ſhaken or reflected on.

The Origin of Common Recoveries.

The Origin of Common Recoveries, and the Occaſion of introducing them has been much controverted among the Learned; and ſome are of Opinion that *Edw.* 4. ſeeing the great Effuſion of Blood in the unhappy Diſputes between the Houſes of *York* and *Lancaſter*; and finding, that tho' he uſed the Extremity of Law againſt the oppoſite Party, by attainting them of High Treaſon, yet their Eſtates were protected in the Sanctuary of Entails, and the Son who ſucceeded the Father, generally inherited his Principles and Party as well as Eſtate. To remedy this, and to give People an Opportunity to Dock their Eſtates, this wiſe Prince brought *Taltarum*'s Caſe on the Stage, in the twelfth Year of his

*P. 9 Reign, as King * *James* I. did *Calvin*'s Caſe, and King *James* II. *Edward Hale*'s

Hale's Caſe, where the judicial Deciſion was made Auxiliary to the *Police*. However it was, it muſt be owned *Taltarum*'s Caſe was cunningly managed, for *Prima Facie*, that ſeems to be an adverſe Judgment, and the Opinion of the Court was for the Iſſue in Tail, againſt the Recovery. The Caſe was this, Tenant in Tail General, makes a Feoffment in Fee, and takes back an Eſtate to him and his Wife, and the Heirs of their Bodies, and the Wife dies, a *Præcipe* is brought againſt Tenant in Tail, and he vouches the Common Vouchee, and held *that the firſt* Eſtate Tail was not barred, becauſe Tenant in Tail was ſeiſed of *another* Eſtate, and the Recovery in Value, which is the Reaſon of barring the Iſſue, goes according to the Eſtate whereof the Tenant was ſeized at the Time of the Recovery, and not in Recompence of the Eſtate he had not, ſo that here * Tenant in Tail being *in* of a Special Eſtate Tail, the firſt Eſtate Tail General was not barred. But by what was ſaid by the Bench in this Caſe,

The Recovery in Value, which is the Reaſon of barring the Iſſue, goes according to the Eſtate Tenant in Tail was poſſeſſed of.

* P. 10

it appears, the Judges were of Opinion, that if in this Caſe Tenant in Tail had come in as Vouchee, he had then come in of all Eſtates he ever had, though diſcontinued and turned to a Right; ſo that from this Caſe, 12 *Edw.* 4. 14, 19. moſt date the *Æra* of Common Recoveries. But it ſeems to others that they are of far greater Antiquity; for when the Judges ſaw the ill Conſequences theſe fetter'd Eſtates introduced, and that they look'd towards a Perpetuity, they always endeavoured to leſſen their Authority. And my Lord *Coke* in *Mary Portington*'s Caſe, 10 *R.* 37. 6. cites ſeveral Caſes that from *Edw.* III.'s Time the Judges were of Opinion that a Common Recovery was a good Bar to an Eſtate Tail. And the Riſe of them ſeems to be from *Octavian Lombard*'s Caſe, 44 *E.* 3. 21. * The caſe was, *Octavian Lombard* brought a Replevin for taking his Cattle, the Defendant avows, for that one *Nicholas* was ſeized in Tail, and had Iſſue *John* and *Joan*; *Nicholas* dies, *John* being then beyond Sea, *Joan* the

For the Reaſon of the Law, vide Shore 373.

*P. 11

Daughter enters, and has Iſſue *Nicholas*, who enters; *John* the Son returns from beyond Sea, and ſues for the Land, and on an Agreement, releaſes to *Nicholas*, and for this Releaſe *Nicholas* grants him 20 *l.* a Year, with a Clauſe of Diſtreſs, and for Rent Arrear avows on the Land charged, then in the Hands of the Iſſue of *Nicholas*, and the Diſtreſs held good. Now the Giſt of this Caſe is, Tenant in Tail *pro Lite redimenda*, grants to one that had a prior Right to the Eſtate a Rent-Charge, in Conſideration of a Releaſe of his Right, this being for the Benefit of the Iſſue, held he could not avoid it. From this Ground it ſeems Common Recoveries had their Origin; for the Iſſue in all Common Recoveries * is ſuppoſed to have a Recompence in Value for the Eſtate loſt, and this Recompence in Value is the Reaſon of his being barred. *T.* 7 *Edw.* 4. 19. *Pl.* 25. Indeed it may be reaſonably objected that this is all Suppoſal, ſince it is notorious that in Reality, the Iſſue on a Common Recovery has no Recom-

* P. 12

pence, and this is all a Fiction of Law. That is true, but *in Fictione Juris ſubſiſtit Equitas*; and all Laws have their Fictions, and all grounded on Reaſon. However, it muſt be owned, that this occaſioned very hard Cenſures on Common Recoveries by the Learned; ſee Sir *Thomas Craiggs De Feodis* 161. ſays, *Et licet ex Jure Anglorum provideri in Feodo Taliato poſit', ne in fraudem hæredum qui in Tallio ſuccedere deberent, Alienatio fiat, qui tamen in foro verſantur, callidis artibus mentem Legis ſubvertunt, & ex Illicito licitum per ambages faciunt, dum quod Vaſſallus alienare non poteſt, propter Conditionem in feodo Talliato expreſſam, id ei *colludenti ſive Conſentienti, ſimulatus contradictor (Revera autem Feodi Emptor) ex tacito conſenſu Judicio Feodum evincit, illi Recuperationem vocant.* But let the Opinions of others be what they will of Common Recoveries, the Publick has found the Benefit of them, and being now Common Aſſurances, the Judges, (as my Lord *Hobart* on another Occaſion ſays) are even

*P. 13

Aſtuti

Astuti in supporting them and inventing Reasons to maintain their Authority. Hence it is, that for several Centuries the sole Reason given for Common Recoveries was the Recompence in Value the Issue had, or by Possibility might have. But in Process of Time it happen'd that there were many Cases wherein the Issue or Party barred, could have no Possibility of Recompence; as if there be Tenant in Tail, Remainder for Years; if Tenant in Tail suffers a Recovery, the Remainder is barr'd, tho' no Recompence in Value can extend to a Term *which is but a Chattel. So if a Feme Covert and her Husband are vouched, she is barr'd tho' the Recompence extends not to her; so contingent Estates are barr'd without a Recompence. And therefore the Judges have been of Opinion, that the Recompence in Value is indeed the true Reason for barring the Issue in Tail, but no Reason for barring the Reversion or Remainder; but the Reason why they are barred is, that the Recoveror is by Supposition

*P. 14

poſition of Law, in of the Eſtate Tail, and that Eſtate Tail, by like Suppoſition of Law, continues for ever. And at Common Law the *Donee poſt prolem ſuſcitatam* might have alien'd and have barr'd the Donor; ſo theſe Common Recoveries were Conveyances excepted out of the Statute of *Donis*, and is a Privilege inherent, and annexed to the Eſtate Tail, and not taken away by that Statute. And the Recoveror being in of the Eſtate the Donee had, and the
*P. 15 Eſtate * Tail continuing in Judgment of Law, he in Remainder is ſo barr'd that no Charge by him can ever take Place.

There is another Objection made againſt Common Recoveries, which is, that when the Tenant appears and vouches to Warranty, that it is notorious here was never any Warranty among them, it being all a Fiction and Invention to bar the Entail. But as to this it muſt be obſerved, that whenever Tenant in Tail is vouched, he comes in of the ſame Poſſeſſion he had before, and

to

to warrant this Poſſeſſion; for when a Man is vouched to warrant, and enters into Warranty, the Law preſumes he parted with the firſt Poſſeſſion with Warranty, and comes now to warrant it, purſuant to this Warranty; and that if it were otherwiſe, he would not enter into the Warranty, but counterplead it, and demand the Lien or Ground on which the Tenant founds his Warranty; but if without demanding the Lien he enters into Warranty, *P. 16 none can ſay he never warranted; for the Tenant cannot ſay the Vouchee never gave him a Warranty, becauſe the Vouchee has entred into Warranty; and the Vouchee cannot ſay he never warranted, becauſe his entring into Warranty is an Eſtopel by Record, which binds him and his Heirs: So none privy to the Record can deny it, nor can any Stranger gain-ſay it, becauſe the Law will always preſume, when any one enters into Warranty, that there was a Warranty by Feoffment or Grant of ſuch an Eſtate as he who is vouched had

had before; and this is *Præſumptio Juris*, and gronnded on Reaſon; for being to the Vouchee's Prejudice, and he binding himſelf to render the Value of the Land in Demand, the Law will not preſume he would thus Prejudice himſelf, unleſs he had warranted.

The Nature and Uſe of Common Recoveries.

The Objections againſt Common Recoveries being cleared, we are now to * conſider their Nature and Uſe. As to their Nature, they are in many Things like Recoveries on Title, † and for this Reaſon in every Common Recovery there muſt be a Demandant and Tenant, and the Tenant being, as has been ſaid before, preſumed to have a Warranty, calls in his Warrantor, who is Vouchee, and he vouches over the Common Vouchee, and Judgments are given juſt as in adverſary Suits, wherein there is a Voucher. And the Land being recovered by him that brought the Writ, the Tenant is left to his Remedy over, againſt him that made Default, and came not according to his Warranty to defend the Tenant, and ſo has Judgment over, againſt him

* P. 17 Shep. Touch. 37.

† Lord Chief Juſtice *Willes*, who delivered the Opinion of all the Judges in the Caſe of *Martin* v. *Strachan* Eaſter 17 Geo. 2. ſaid "We think Common Recoveries are Common Aſſurances with the Conſent of the Parties and are not to be compared to a Judgment or Proceeding in any other real Action.

to

to recover in Value, and by this Means the Eſtate Tail, that was made by the Tenant or his Anceſtors, is barred; for that it is pretended he had now no Power to intail the Land whereunto he had no juſt Title, as now appears by the Recovery, the Land being evicted * and recovered from him. And though thus far Common † Recoveries agree with Recoveries on Title, yet in other Things they differ; for a Recovery on a Title cannot be to an Uſe; but a Common Recovery being a Common Aſſurance, is always either to the Uſes declared, or to the Uſes the Land was before. There is likewiſe a Difference between a Recovery and a Fine; for a Fine proves a Right in him that levies it, but a Common Recovery diſapproves and diſaffirms all Title of him againſt whom it is had, *Popham* 23, and this ſo ſtrongly, that if there be three or

1ſt, Becauſe now by long Cuſtom and Uſage they are become Common Aſſurances; 2d, becauſe they are ſuffered by Conſent of the Parties,

* P. 18

and a Remainder can be barred upon no other Principle but this, that a Common Recovery is a Common Aſſurance, 5 Rep. 40. a. b. Mr. *Piggot* (he ſaid) who was as able a Conveyancer as any Man of the Profeſſion, has confounded himſelf and every Body elſe who reads his Book, by endeavouring

to give Reaſons for, and explain Common Recoveries. 1 Wilſon 73.

† Recoveries] The Force of Recoveries to extinguiſh all Conditions, Powers, and Incidents annexed to an Eſtate Tail, ariſes from hence, that the Law conſiders them in the Nature of real Actions, and the Recoverors are in by *Right*. 2 Atk. 591. Jan. 8. 1741. and ſee 2 Atk. 206.

four Diſcents caſt after the Recovery ſuffered, the Recoveror may enter, for the Recovery binds the Blood, and diſapproves the Title. 6 *Edw.* 4. 11. Before 32 *H.* 8. *cap.* 31. Common Recoveries had ſo ſtrong an Operation, that if a *Præcipe* had been brought againſt Tenant for Life, and Recovery ſuffered, it had bound thoſe in Re-
*P. 19 * mainder; ſo if after the Sta. t32 *H.* 8. and before the Stat. 14 *Eliz.* Tenant for Life had let for Years to one who made a Feoffment, and a *Præcipe* had been brought againſt the Feoffee, and he had vouched Tenant for Life, this had bound the Remainder; but the Stat. 14 *Eliz. cap.* 8. helps it. 10 *R.* 43. 3 *Cro.* 562. *Moore Pl.* 955. *Coke's Ent. Pl.* 7.

It muſt not be omitted that ſeveral Statutes, as well as 32 *H.* 8. and 14 *El.* have call'd theſe Common Recoveries feigned Recoveries, and ſeemed to caſt a Reflection on them; but that in Reality was only a Reflection upon the Abuſe of Common Recoveries. But on the

the other Hand, 7 *H.* 8. *c.* 4. allows them, and enacts, Recoverors may avow without Attornment. 10 *R.* 37, 38. *Dr. and Student* 88. which ſhews they were lawful; for it is not to be preſumed the Legiſlature would give any * Countenance or Remedy to Things il- * P. 20
legal.

As to the Uſe of Common Recoveries, they were invented and are uſed to bar Eſtates Tail and Remainders, and Reverſions expectant on them, and to reduce all Eſtates to that Purity and Condition they were in at Common Law, and to avoid, as much as may be, the Inconveniences the Statute *de Donis* brought into the Commonwealth, ſince without theſe Recoveries, as my Lord *Coke* obſerves, Tenant in Tail can make no Jointure for a Wife, Proviſion for his Children, or Payment of his Debts.

The Origin, Nature and Uſe of Common Recoveries being ſhewn, I ſhall here Recapitulate ſome Obſerva-

tions made before, and ſet forth what Caſes occur in the Books in this Matter.

Firſt, a Common Recovery, by Tenant in Tail, bars the Eſtate Tail, and
*P. 21 * all Remainders and Reverſions thereon expectant; for at Common Law, that which is now an Eſtate Tail being a Conditional Fee, no Remainder could be after a Conditional Fee; for a Fee, by the Rules of Law, cannot mount on a Fee. Now though the Statute *de Donis* turns this Conditional Fee into an Eſtate Tail, yet a Recovery, as has been obſerved before, was an Inherent Privilege not taken away by that Statute, and it is a Conveyance excepted out of that Statute by Conſtruction
Shore 377. of Law; and for this Reaſon, he who comes in under Tenant in Tail, is liable to all his Charges; for the Recoveror comes in, in Continuance of the Eſtate Tail, for the Recovery inlarges the Eſtate Tail, which, by Suppoſition of Law, has a perpetual Continuance.

2 *Lev.*

2 *Lev.* 29. 1 *Mod.* 110, 111. *Sid.* 285. 3 *Keb.* 289. And this is the true Reaſon why the Remainders and Reverſions are barred; but the Reaſon why the * Iſſue is barr'd by a Common Recovery, * P. 22 is the intended Recompence, 2 *Lev.* 30. and this Recompence is regarded in Law, and though in Reality there is none, yet the Law ſuppoſes a Recompence, and for this Reaſon the Iſſue is never barr'd without a Recompence or a Poſſibility of one; for which Reaſon if Tenant in Tail makes a Feoffment in Fee, and a *Præcipe* is brought againſt the Feoffee, who vouches Tenant in Tail, and he vouches the Common Vouchee, this bars the Eſtate Tail, becauſe Tenant in Tail coming in as Vouchee, he ſhall be in the Degree of Tenant in Tail, and the Recompence in Value he has, or by Poſſibility may have, goes to the Eſtate Tail, and when he comes in as Vouchee, he comes in of all Eſtates he ever had. But if in this Caſe, if Feoffee had re-enfeoffed Tenant in Tail, and the *Præcipe* had been

been brought againſt Tenant in Tail, and he had † vouched the Common Vou- * chee, there Tenant in Tail not being ſeized of the Eſtate Tail, but of another Eſtate, there the Iſſue is not barr'd, becauſe the Recovery in Value goes according to the Eſtate whereof he was ſeized, and in Poſſeſſion at the Time of the Recovery, and not in Recompence of the Eſtate he had not; it is true, as has been ſaid before, the Vouchee in the firſt Caſe may demand the Lien, and then ſhall only be barr'd of that Eſtate to which the Warranty is annex'd; for the Recompence goes according to the Lien, but when Tenant in Tail comes in as Vouchee, and demands not the Lien, then he comes in of all Eſtates he ever had. *Plow. Maxwell's* Caſe, 8. 14. And this Rule of the Recompence in Value is ſo true, that when the Iſſue has no Recompence, he is not barr'd; as if there be a Recovery againſt Tenant in Tail and no Voucher, as by Default, and Tenant in Tail dies, the Iſſue is remitted, but

† What Eſtate ſhall be *P. 23 barred by a Recovery with ſingle Voucher, ſee 2 Rol. Abr. 394, 395. and what Eſtate ſhall not be barred thereby. Ibid.

Mich. 10 Ed. 3. 51. Hob. 26.

if

* if he had † vouched over, there had been no Remitter, becauſe he has, or may have Aſſets, and if he ſhould falſify, he would have the Eſtate Tail and Aſſets alſo: And it is a known Rule, that the Iſſue in Tail never can defeat any Act but what is to his Advantage; and if the Iſſue has Aſſets, or a Poſſibility of Aſſets, it is ſufficient, and the Recovery in Value goes to him that loſes the Tenancy, and *Formedon* lies for the Aſſets, and he has ſuch Eſtate in the Aſſets as he loſt. *Plow.* 514. *a.* And there is a very good Caſe to this Purpoſe, 17 *Ed.* 2. 545. *J. Chamberlaine*'s Caſe, which was this, Aſſize of Novel Diſſeiſin by *B.* againſt *A.* and *J. J.* anſwers as Tenant, and vouches to Warranty *A.* who enters into the Warranty, and pleads with the Plaintiff, and Judgment is given that the Plaintiff ſhall recover againſt *J.* and he over, againſt *A.* and *J.* brings a Writ of Error to reverſe this Judgment, and held that * Error does not lie, for *J.* is by the Judgment to recover againſt *A.* the Vouchee, who was Tenant, ſo *J.* had nothing

* P. 24

† Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life with Remainders over, to his Son in Tail, &c. and afterwards ſuffers a Recovery with ſingle Voucher (wherein he is Tenant to the *Præcipe* and vouches over the Common Vouchee) to other Uſes in Fee, the Uſes on the Recovery are held good; for where a Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his Iſſue in Tail, this is abſolutely

* P. 25

void, for the Remainder is to take Effect at the Death of the Tenant

nothing to do with the Judgment, being at no Loſs. And its there held that Voucher in Aſſize is not like Voucher in other *Præcipe's*; for in other Writs when Vouchee enters into Warranty, the Tenant is out of Court, and the Vouchee only Party to the Plea; but here he cannot loſe but by Verdict of the Aſſize; and here, if the Tenant ſhould reverſe the Judgment, he will be reſtored to the Land loſt, and have Recovery in Value alſo, and he who has the Loſs muſt have Error, and that is the Vouchee, which ſhews how much Notice the Law takes both of the Loſs and Recompence; but from this Caſe it muſt not be concluded that the Common Vouchee in a Common Recovery may have Error, for he is only a formal Party, and the Court takes Notice of it. *Hob.* 28. 3 *Cro.* 2, 3.

in Tail, when by his Death the Title of the Iſſue commences, and that is an elder Title concurring with it, and therefore it is void; and the Covenant as to the Eſtate for Life to himſelf is void, becauſe here is no tranſmutation of Poſſeſſion: and ſuch Covenant is in any Caſe only good in Reſpect of the Remainders, and ſince the Remainder here is void, the Covenant and the firſt Eſtate are void. So the Covenant to ſtand ſeiſed, &c. did not alter the Eſtate Tail, and the Recovery was held a good Bar of the Eſtate of the Iſſue in Tail. Comyns 119. Machel and Clarke. 1 Salk. 619. S. C. Farreſl. 18.

*P. 26 *Secondly, We muſt obſerve that theſe Common Recoveries are now become Common

Common Aſſurances of Land, and therefore are favoured by the Judges, and the Intent of the Parties reſpected and ſupported as far as may be. 2 *R.* 74. 3 *Rep.* 3. 5 *R.* 20. 146. and a Fine, Recovery and Deed to lead the *Uſe*, are all but one Conveyance, tho' they have ſeveral Operations, which ſee well debated in *Cromwell* and *Andrew*'s Caſe. 1 *Cro.* 15.

Thirdly, As to their Common Uſe and Method, if the Tenant be in Court and the Vouchee, then there is no great Difficulty in the Matter, it is all done at the Bar; but if the Tenant be abſent, then there muſt be a *Dedimus poteſtatem de Attorn' faciend' & tertio Sumons' ad Warrand'*; and then Care muſt be taken that all be regulary and carefully done. If there be Father Tenant for Life, Remainder to the Son in Tail, Remainder over, and a Recovery * is to be ſuffer'd, it is ſafeſt to have a Recovery with treble Voucher; and let the Tenant to the *Præcipe* vouch the Father; and the Father the Son, and the Son the Common Vouchee; for by this Means,

* P. 27

if the Father has any antient Entail veſted in him, he coming in as Vouchee, is barr'd, which would not be if the *Præcipe* was brought againſt the Father, and he vouched the Son. And the Party who is concern'd to look into a Recovery is carefully to ſee if the Writ of Entry be duly filed, and the Proceedings regularly entred, and to have an † Exemplification of the Recovery; for I have known ſome Attornies ſo remiſs as to take all the Fees for a Recovery, and barely take it at the Bar, and do nothing more.

† There are many *Exemplifications* of Recoveries ſuffered at the Bar, between the beginning of the Reign of Queen Anne, and about the beginning of the Reign of King George the Second, whereof no Entries upon the Rolls in the Treaſury of the Common Pleas, or Writs of Entry, Summons and Seiſin can be found thereto belonging; this being diſcovered by this eminent Author and Conveyancer, the Statute of the 14 Geo. 2. c. 20. to amend the Law concerning Common Recoveries, *&c.* was made, to prevent the Miſchief which might happen to Purchaſers from ſuch Neglect, whereby among other Things, it is enacted, that after 20 Years Poſſeſſion under a Recovery, the Deeds to lead the Uſes thereof ſhall be deemed good Evidence that ſuch Recovery was duly ſuffered, in caſe no Record thereof can be found, or the ſame be not regularly entered on Record. See the Statute.

CAPUT.

*CAPUT II. *P. 28

Of the Tenant to the Præcipe.

IN every real Suit there muſt be a Demandant and Tenant, the Demandant is the Party grieved, and who, in the Courſe of Juſtice demands a Reparation for the Tort done him. The Tenant is the Wrong-doer, and who with-holds the Land or other Thing demanded, ſo that though Common Recoveries are deemed to ſome Intents fictitious, yet there muſt be *Actores fabulæ*, for which Reaſon there muſt be a Tenant to the *Præcipe*; that is, the Writ of Entry muſt be brought againſt one that is † actually ſeized of the Freehold by

The Tenant to the *Præcipe* muſt be actually ſeiſed of the Freehold, or elſe the Recovery is void.

† Actually ſeized] *John Dormer* the Father by a Settlement made before the Marriage of his Son *John Dormer*, after limiting an Eſtate to his ſaid Son and the Heirs of his Body, limits it, in default of ſuch Iſſue, to the Uſe of *Robert Dormer* for 99 Years, if he ſo long live, and after his Death or other ſooner Determination of that Eſtate ſo limited to him, to *T. S.* and *J. R.* Truſtees and their Heirs during the Life of *Robert Dormer* upon Truſt to preſerve the contingent Uſes therein after limited from being defeated, and after the End of the ſaid Term to the Uſe of the firſt and other Sons of the ſaid *Robert Dormer* in Tail

by Right or Wrong, or elſe the Recovery is void; for in every real Action there muſt be a good Tenant to the Freehold, otherwiſe he cannot render the Land as the Writ commands; and * though the Tenant may plead Non-Tenure, yet if he does not, the Iſſue in Tail is not barr'd, who may plead *Nient Tenant tempore brevis*, 12 *Edw.* 4. ‡ 12, 19. becauſe the Iſſue is not eſtopped ſince he claims *Per formam Doni*, 3 *R.* Marquis of *Wincheſter*'s Caſe. But if there be a good Tenant to the *Præcipe*, before the Return of the Writ, it is good; for even in adverſary Writs, if the Tenant was not Tenant at the Teſte of the Writ, but was before the Return, it was well. If he were not Tenant at the Return of the Writ, he might

Tail Male, with ſeveral other Remainders, and the laſt Remainder to *Euſebe Dormer* the Father of the Leſſor of the Plaintiff in the ſame Words as the Limitation to *Robert Dormer*. *Robert Dormer* had one Son *Fleetwood Dormer*, and when he came of Age, they levied a Fine to make a Tenant to the *Præcipe*, and ſuffered a Recovery in which *Fleetwood* was Vouchee: By the Opinion of all the Judges, the Fine and Recovery were no Bar; for a good Eſtate being veſted in Truſtees during the Life of *Robert Dormer*, he and his Son could not by any Act defeat the Remainder Men, without the conſent and joining of the Truſtees, during the Life of *Robert Dormer*, as the *Freehold* was in them: The plain Intent of making *Robert Dormer* Tenant for 99 Years, was to prevent him and his Son from barring the Eſtates in Remainder without joining the Truſtees. 3 Atkyns 135, 136. *Smith* on the Demiſe of *Dormer* v. *Parkhurſt & al.* 23d Feb. 1741. in Error *in Domo Procerum*.

* P. 29

‡ Shore 347

might abate the Writ by pleading Non-tenure; but if in that Caſe he vouched over, then as to himſelf he admitted the Writ good; but then the Vouchee might counter-plead the Tenancy; but if the Vouchee does not counter-plead the Tenancy, it is good againſt them all by Eſtoppel. But in this Caſe the Tenant ſhall not Recover in Value, becauſe he is at no Loſs; but if he be-
* come Tenant after the Voucher, and * P. 30
before Judgment is given, where the Vouchee is ſummon'd *ad Warrantizandum* by Writ, and appears at the Return, as in *Lacy* and *William*'s Caſe. *Salk.* 568. Then the Judgment not being given on the *Præcipe*, but on the laſt Voucher, this Judgment binds the Land; ſo that when the Recoveror takes out Execution, the Tenant by a ſubſequent Purchaſe cannot avoid this, for the Tenant is become a Loſer, and ſhall recover in Value againſt the Vouchee, and the Vouchee over. *Hut.* 112, 113. And if it be a Recompence by Eſtoppel,

1 Ld. Raym. 227, 475. S. C. 2 Salk. 568. S. C.

Eſtoppel, this concludes Parties and Privies, and is good to bar them. *Stiles* 319. Now if it be thus in adverſary Writs, much more in Common Recoveries; and therefore in Common Recoveries, if there be a good Tenant to the *Præcipe* any Time before Judgment, it is good, with this Diverſity, that if the Tenant comes to the Land by his own
*P. 31 *Act, he can never plead it to abate the Demandant's Writ, but has thereby made the Writ good; but if he comes to the Land by Act of Law, he may abate the Writ by pleading Non-tenure. As if a Son has a *Præcipe* brought againſt him in the Life of his Father, and his Father dies, he may plead Non-tenure, if the Land deſcended to him by his Father's Death. 1 *H.* 6. 12. 5 *H.* 5. 9. 8 *Edw.* 3. 82. 37 *H.* 6. 16. 3 *H.* 7. 8. 41 *Edw.* 3. 5.

There is another Reaſon why a Tenant to the *Præcipe* is neceſſary, *viz.* becauſe the Eſtate Tail of the Vouchee

is

is barr'd only in Respect of the Assets recovered, or which by Possibility may be recovered in Value: Now till the Demandant sues Execution against the Tenant to the *Præcipe*, the Tenant cannot have Execution against the Vouchee, nor the Vouchee against his Vouchee; and if the Tenant to the *Præcipe* had nothing in the Land, no Exe-
*cution can be sued against him, and if *P. 32
no Execution can be sued against him, no Recovery can be had over in Value, and consequently no Recompence to bind him, and so the Recovery can be no Bar. And to inforce this, *Littleton* in *Taltarum*'s Case says, when there is no Tenant to the *Præcipe*, there is no Recovery, because there is none against whom the Demandant may recover the Land, and a Recovery proves not the Tenant seized, but supposes it. *Plowden* in *Manxwell*'s Case, elaborately urges this Point, and endeavours to prove that a Common Recovery may be good,

good, where there is no Tenant to the *Præcipe*. Now all his Arguments ſeem to centre in this, that all Parties and Privies to the Recovery are eſtopped, to ſay there was no Tenant to the *Præcipe* againſt the Admittance on Record. But it is plain that Eſtoppels bind not the Iſſue in Tail; and the Law is now ſet-

*P. 33 tled, that if there be no Tenant to *the *Præcipe*, the Common Recovery is void, and the Iſſue in Tail may falſify, that is, reverſe it for this Error; for the Recovery in Value (as has been ſaid before) goes to him that has the Loſs, or loſes the Tenancy; and he that loſes may aver againſt a Stranger that he loſt nothing, ſo ſhall recover nothing: And if ſo, *a fortiori* the Iſſue in Tail, who comes paramount all Concluſions and Eſtoppels, may aver *Nient Tenant' tempore brevis*, 3 *R.* 5. 6. 60. *a.* 12 *Ed.* 4. 12. 19. *Cro. Car.* 309. *Cro. El.* 21. *Moor* 255. 4 *Leon.* 23. But if one that has a Remainder in Fee ſuffers a Common Recovery, it binds and eſtops

eſtops his Heirs, though there is no Tenant to the *Præcipe*. *Stiles* 320. 2 *Croke* 21. and in a Writ of Right, a Recovery may be good without a Tenant to the *Præcipe* 1 *Vent.* 360. But in a *Warrantia Chartæ*, he who brings the Writ muſt be Tenant of the Land the Day of the Writ purchaſed; and it is a * good Plea to ſay *Nient Tenant Jour del Brief*; ſo if one releaſe with Warranty, he may vouch him that releaſed; but it is a good Plea to ſay Releaſee had nothing at the Time of the Releaſe. *Hob.* 21, 24. * P. 34

Though a Tenant to the *Præcipe* be ſo eſſentially neceſſary to a Common Recovery, yet if a Stranger who has nothing in the Land be added and made Tenant with him that is ſeized of the Land, it hurts not, for the Recompence in Value goes to him that loſt the Eſtate. 1 *Vent.* 350.

Having ſhewed the Reaſon why a Tenant to the *Præcipe* is ſo abſolutely neceſſary in a Common Recovery, I ſhall now ſet down the Caſes that occur

in the Books about this Matter, which will ſerve to illuſtrate this Point.

Leſſee for another's Life, makes a Leaſe for ſixty Years and dies, and he in Reverſion, being Tenant in Tail, ſuffered a Common Recovery, and held * Erroneous for want of a good † Tenant to the *Præcipe*; for the Freehold was caſt on Leſſee for Years as Occupant, and ſo he, or ſome claiming under him, ought to have been Tenant to the *Præcipe*. 1 *Keb.* 735, 785.

* P. 35

† See the Stat. 14 Geo. 2. c. 20. to amend the Law concerning Common Recoveries, &c.

3 Rep. 6.

Huſband makes a Feoffment to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of their Bodies, and a *Præcipe* is brought againſt him and his Wife, and they vouch Common Vouchee, this bars not the Entail, for the Woman is not a proper Tenant to the *Præcipe*, for the Reaſons that ſhall be hereafter declared: So if a Man be ‡ Tenant for Life,

‡ *A.* was Tenant for Life, Remainder to *B.* in Tail, Remainder to *C.* for Life, &c. *B.* leaſed and releaſed to *A.* then a *Præcipe* was brought againſt *A.* who vouched *B.* and *C.* and they vouched the Common Vouchee. *Holt* held that this was a good Recovery to bar the Intail, though *C.* had but an Eſtate for Life, and after Conſideration gave his Opinion accordingly. 2 Ld. Raym. 754.

Life, Remainder to *B.* in Tail, if a *Præcipe* be brought againſt both, this bars not the Entail; ſo of a *Præcipe* againſt Mortgagor and Mortgagee: And the Reaſon of all theſe Caſes is, becauſe the Land recovered in Value ſhall be in the ſame Degree as the Land loſt; and when a Joint *Præcipe* is brought *againſt Baron and Feme, Tenant for Life and him in Remainder, Mortgagor and Mortgagee, it ſuppoſeth them to be Jointenants, and the Judgment muſt be againſt them as Jointenants, and the Recovery in Value according to the Action, whereupon he recovered, and ſo ſhall be the Execution, then the Recovery in Value being accordingly, it is in the ſame Degree the Eſtate Tail was, ſo no Bar to the Iſſue in Tail or Remainder, the Recovery being of a Joint-Eſtate. Further the Cauſe of the Bar is, the Aſſets recovered in Value, and none ſhall be admitted to ſay the Aſſets went otherwiſe than the Recovery is; and in theſe Caſes the Writ being Joint, and the Tenants vouching as Jointe-

*P. 36

Quære, Becauſe, though this was formerly the better Opinion, yet now the Reaſon comes to hold, *quod vide* in *Page*'s and *Hayward*'s Caſe, 2 Salk. 570. *Ideo Quære.*

nants, the Recompence goes to ſuch Joint Eſtate Tail the Tenants had, and not to the Eſtate Tail of the Feme or him in Remainder, 3 *R.* 6. and the Iſſue is never barred, but where Recovery in Value goes in lieu of the firſt *Entail, which this Joint Eſtate cannot, and the Aſſets and Recompence cauſing the Bar, the Aſſets cannot veſt in him in Remainder only, and ſo go to the Eſtate Tail, but muſt enſue the Loſs by the Recovery, whereby it veſts in Baron and Feme and Tenant for Life, and Remainder-Man jointly. *Dyer* 252. 3 *Cro.* 670. 10 *R.* 39. 645. Theſe are the Reaſons given for theſe Caſes, which indeed ſavour of a wonderful Subtilty; and though no Man would venture to ſuffer a Recovery in this Manner, yet theſe ſeem to me to be *Apices Juris*, and perhaps if now agitated again, would not be ſo eaſily admitted, ſince the Courts at Law now uſe all Means to ſupport Common Recoveries, as Aſſurances, now commonly uſed for Conveyance of Eſtates. *Ideo Quære.*

*P. 37

1 Leon. 86.
2 Leon. 9.

See the Caſe *Page* v. *Hayward*, *T.* 3 *Annæ*, *B. R.* where theſe Recoveries ſeem to be good.

If

If there be Tenant for Life, Remainder in Tail, Remainder in Fee, if he in Remainder in Tail suffers a Com-
* mon Recovery, it bars not the Entail, * P. 38
because no Tenant to the *Præcipe*; but if he in Remainder in Fee suffers a Recovery, that bars his Heirs, as has been said before. *Dyer* 252. 2 *Roll's Abr.* 395. *Moore* 356.

Lands are given to Husband and Wife, 2 Inst. 342.
and the Heirs of the Body of the Husband, Remainder over, the Husband alone suffers a Recovery, wherein he is Tenant to the *Præcipe*, and vouches the Common Vouchee, this is no Bar to the Issue, or him in Remainder; for the Recompence cannot enure to the Estate, the Wife having a Joint Estate with her Husband, she cannot be a Partaker of the Recompence, because she was no Party to the Recovery; for the Estate between Husband and Wife is an entire Estate, and no Moiety between them; so the Husband alone no good Tenant to the *Præcipe*, and the Estate Tail and Remainder depended on

the Eſtate of Huſband and Wife, as on
*P. 39 *an Entire Eſtate. 5 *R.* 5. *Owen* 129, 130. *Moore* 210. *Aliter* of a Joint Eſtate conveyed to them before the Coverture; for there one Moiety is barr'd. *Moore* 95. *Coke* Marquis of *Wincheſter*'s Caſe. But if Huſband be ſeiſed in the Right of his Wife for Life, Remainder in Tail to *A.* Remainder over to *B.* Huſband by Bargain and Sale inroll'd, or by Leaſe and Releaſe grants the Land to another, againſt whom a *Præcipe* is brought, who vouches *A.* and a Common Recovery is had; this bars all the Remainder and Entail, for here was a good Tenant to the *Præcipe.* 2 *Roll's Abr.* 394. So is *Cupledick*'s Caſe. Huſband and Wife ſeiſed for Life, Remainder to the Heirs Male of the Body of the Huſband; Huſband diſcontinues, and a *Præcipe* is brought againſt the Diſcontinuee, who vouches the Huſband, who vouches the Common Vouchee, this is a good Recovery. 3 *R.* 6. *a.*

Though

* Though a Tenant to the *Præcipe* be abſolutely neceſſary in every Common Recovery, yet if it be by Diſſeiſin, it is good in many Caſes. As if Tenant in Tail be diſſeiſed, and a *Præcipe* is brought againſt the Diſſeiſor, and he vouches Tenant in Tail, who vouches over, this bars the Entail. So in *Lincoln* College Caſe, 3 *Rep.* 58. *b.* a Man makes a Feoffment, to the Intent the Feoffee ſhould reconvey to him and his Wife and the Heirs Male of his Body, which they do accordingly, and he has Iſſue a Son, and dies, the Son in his Mother's Life-time, *Tenens liberi Tenementi*, which muſt be intended by Diſſeiſin, (being on pleading, and to be taken moſt ſtrongly againſt the Pleader) ſuffers a Common Recovery, and Wife Releaſes with Warranty, and notwithſtanding 11 *H.* 7. *cap.* 20. held the Entail barr'd. 3 *R.* 58. 1 *Inſt.* 326, 365. *b.* 1 *Mod.* 218. 2 *Roll's Abr.* 395.

* P. 40

Concerning Tenant to the *Præcipe* by Diſſeiſin.

Upon

*P. 41 There muſt be a Tenant to the *Præcipe* either by Right or Wrong.

* Upon what has been already ſaid, it is apparent there muſt be a Tenant to the *Præcipe*, either by Right or Wrong, and therefore in many Caſes it may ſeem wholly impracticable for thoſe who have the Remainder in Tail to ſuffer a Recovery: The moſt uſual Way is for him in Remainder to get the Tenant for Life to † ſurrender to him conditionally; and in this, though the Tenant for Life keeps the Poſſeſſion, yet the Recovery will be good. But if a Common Recovery be to be ſuffered of a Manor, wherein are many Leaſes for Lives of Part of the Manor, tho' the Practice has been to get Surrenders from the Leſſees, that is only *abundans Cautela*; and I take it not to be neceſſary; and I think the Recovery good, though the particular Tenants for Lives did not ſurrender; for the Reverſion of the Lands leaſed for Lives, remains ſtill Part of the Manor; and the Fine or Deed that made the Tenant

† Surrender] A Surrender of a Tenant for Life ſhall be preſumed on a Recovery of 40 Years ſtanding. 2 Str. 1129.

*P. 42 * to the *Præcipe*, carried the entire Manor

nor to him, as well Reverſions as Poſſeſſions; for the Manor being an entire Thing, the Freehold thereof was in the Tenant to the *Præcipe*, to make this good, I ſhall endeavour to prove two Things.

Firſt, That whatever is Part of the Manor, whether in Poſſeſſion or Reverſion, paſſed with the Manor.

Secondly, That the Reverſions of the Tenants for Life are Part of the Manor, and paſs'd by Grant of the Manor to the Tenant of the *Præcipe*, and conſequently the Recovery of the Manor a good Recovery.

As to the firſt Point, if we look into the antient Year-Books, which are moſt nice and exact in all Real Actions, we cannot find one Inſtance of a *Præcipe* of a Manor, and another of Lands leaſed for Lives, that are Part of the Manor: But on the contrary, if a Man brought a *Præcipe* of a Manor, and in *it demanded any Lands, Part of the Manor, he muſt either abridge his *P. 43

Plaint, or if the Tenant pleaded this Matter in Abatement, the Writ was abated *quia bis petitum*, it being ſuperfluous to demand the ſame Thing twice; and if Lands are mentioned with a Manor, they ſhall be intended to be no Part of the Manor, becauſe all that is Part of the Manor is comprehended in a *Præcipe* of the Manor; as 36 *H.* 6. 17. *Sci' Fac'* to have Execution of the Manor of *Dale*, and ſix Acres of Land, it is no Plea to ſay the ſix Acres are Parcel of the Manor, becauſe the contrary ſhall be intended. 48 *Ed.* 3. 11. *Pl.* 2. *Sci. Fac'* on a Fine of the Manor of *B.* and demands forty Acres of Land, and twenty as Parcel of the Manor, the Tenant pleads *Nient Comprize*, and held no Plea, becauſe every Part and Parcel of the Manor paſs'd by the Grant of the Manor by the Fine, and therefore the proper Plea *P. 44 * was *Nient parcel*, which ſhews that if the Land be parcel of the Manor, whether in Poſſeſſion or Reverſion, it paſſes

by Grant of the Manor, which is an entire Thing, 34 *H.* 6. 1, 2. *Præcipe* of a Manor, Entry into a Part, abates the Writ, *aliter* of Acres ſevered.

As to the ſecond Point, it muſt be confeſſed that the Reverſion of the Tenements in Leaſe was in the Owner of the Manor, otherwiſe he could not have the Rents and Services; ſo that it muſt be either a Reverſion in Groſs divided from the Manor, or elſe Part of the Manor. That it ſhould be a Reverſion in Groſs, divided from the Manor, has no Colour or Reaſon; for when a Man is ſeiſed of a Manor and Demeſnes in Poſſeſſion, and makes a Leaſe for Life, and parts with the Poſſeſſion of what he ſo leaſes in Lieu of the Poſſeſſion, he has the Reverſion and Services, which are annex'd to the Manor and Part of it, and the Reverſion and Services na- turally follow the Right and Nature of the Land. As if a Biſhop hath a Manor, and a Tenancy eſcheats, he has the Tenancy *Jure Eccleſiæ*; for the Te-

2 Roll. Abr. Tit. Grant, 58.

* P. 45

nancy came in Lieu of the Services, and the Services being Part of the Manor, the eſcheated Tenancy became Part of it, and is incorporated to it. And our Caſe is ſtronger; for if a Tenancy eſcheated, which has Time immemorial been held of the Manor, is incorporated to the Manor, and becomes Part of it when it falls, *a fortiori* the Reverſion, which was never divided from the Manor, and was always Part of it, paſſes by Grant or Recovery of the Manor. And in our Caſe there was only a temporary Intereſt granted for Life, and therefore the Reverſion remains in the Grantor, as what he never parted with, and the Services attend the Reverſion; and as the Poſſeſſion was Part of the Manor, ſo are the Reverſion and Services which follow the Ma-

*P. 46 * nor as a Recompence for and in Lieu of the Poſſeſſion granted to Tenant for Life. *Litt. ſect.* 590. And this is not like the Caſe of the Grant of a Manor, excepting an Acre, for there the Acre

is

is divided from the Manor. 6 *R.* 55, 66. But even in that Caſe, as to him that has a Right to demand the Manor, it remains Parcel, *Finch* 18. So if one leaſe a Manor for Life, except the Advowſon, thereby the Advowſon becomes Diſappendant, becauſe the Exception ſevers it from the Manor: But if one grant an Advowſon Appendant for Life, the Reverſion is ſtill Part of the Manor, and paſſes with it, 5 *R.* 11. *b.* which ſhews the Difference between an Exception which ſevers the Thing excepted from the Manor, and a Leaſe for Life; for by the Leaſe nothing paſſed but what the Leſſor intended, and what is not leaſed remains in the Leſſor in another Degree, 38 *H.* 6. 38. *a.* If one leaſe an Acre Parcel of a Manor * for Life, and after grant the Manor, * P. 47 the Reverſion paſſes, becauſe the Acre was always Part of the Manor, and no more paſſes than what was granted, and that is only for Life; ſo what was not granted remains in the Grantor; and though the proper Term of Law for this

this is a Reverſion, yet the natural plain Senſe is no more, than that I am ſtill ſeized of what is not granted, that is of the Land, Parcel of the Manor in another Degree than when in Poſſeſſion. If I am ſeized of a Manor, and am diſſeized of an Acre Parcel of the Manor, it is not ſevered in Right, tho' it is ſevered in Poſſeſſion; for by my Entry it becomes Parcel again. *M.* 7 *H.* 7. 8. *Pl.* 10. ſo an actual Severance is no Severance in Right, much more where there is no Severance at all. As to Authorities in Point, the Books are full of them, where it is unanimouſly held, that if a Man ſeized of a Manor leaſes Part of it for Life, the Re-

*P. 48 * verſion ſtill remains Part of the Manor. *Litt. Sect.* 590. 1 *Inſt.* 324, 325. where a Diverſity is taken that a Reverſion of Part may be Parcel of a Manor in Poſſeſſion, but a Part in Poſſeſſion cannot be Parcel of a Reverſion. 2 *Leon.* 222. *Cro. El.* 522. 5 *R.* 12. 11 *R.* 50. *Cro. Ca.* 306, 308. *Winch* 46. *Litt. Sect.*

Sect. 149, 227, 557, 591. 1 *Inſt.* 104, 151, 323. *a.* 324. *a. b.* And of this Opinion were Sir *Edward Northey*, Attorney General, Mr. Serjeant *Lutwich*, Mr. Serjeant *Broderick*, Mr. *Richard Webb*, and Mr. *Powley*, in a Caſe of great Concern left to be determined by Opinion of Counſel, between the Earl of *Pembroke* and the Lord *Windſor*, touching ſome Leaſes for Lives, which not being ſurrender'd, were ſuppoſed not to be barr'd by a Recovery ſuffered by the Earl of *Pembroke*, which being now queſtioned by the Lord *Windſor*, who married the only Daughter and Heir of the late Lord *Pembroke*, the Caſe being fully * weighed and debated by Counſel of both Sides, it was agreed that the Reverſion of thoſe Tenements in Leaſe for Life paſs'd, and the Entails therein were well dock'd, by the Recovery ſuffer'd by the Earl of *Pembroke*, in which Caſe Sir *Edward Northey* ſtarted a Difficulty that the Tenant to the *Præcipe* being made by Fine, the Reverſion could not

* P. 49

not paſs without Attornment; but as to that it is plain the Reverſion paſs'd by the Fine without Attornment. 1 *Inſt.* 319, 320. and the Fine being to an Uſe, there needs no Attornment; ſo if it had been by Bargain and Sale inroll'd, or Leaſe and Releaſe; for the Eſtate veſts by Operation of the Statute of *Uſes*, which is by Act in Law, ſo no Attornment neceſſary, 1 *Inſt.* 309. *Moore* 32, 68. *Hob.* 165. 3 *Leon.* 101. 6 *R.* 68. 1 *Jones* 244. And the Objection was waived, and Lord *Windſor* had the Lands in Diſpute; and the ſame Point hath ſince been agreed and determined * in the Earl of *Derby*'s Family, *vide* the Appendix.

*P. 50

See the Stat. 14 Geo. 2. c. 20. for amending the Law concerning Common Recoveries.

If the Land, of which the Recovery is intended to be ſuffered, is not Part of a Manor, and is in Leaſe for Life, then it muſt be ſurrendered to him that has the Reverſion or Remainder, before he makes a Tenant to the *Præcipe*; or if the Surrender be after the Conveyance, that makes the Tenant to the *Præcipe*,

Præcipe, then to the Tenant to the *Præcipe*; and by miſtaking this, ſeveral Recoveries have been ſet aſide: As for Example, If after the Leaſe and Releaſe executed to make the Tenant to the *Præcipe*, the Tenant ſurrenders to the Releaſor, this is void, for he has no Reverſion for the Surrender to operate upon.

Though as has been before obſerved, where there is a Leaſe for Life, no Part of a Manor, that muſt be ſurrendred to make a good Tenant to the *Præcipe*, yet no Term for Years hinders him that has the Freehold from ſuffering a Com-
*mon Recovery, becauſe the Law has *P. 51
little Regard to Terms for Years, which are only Chattels. And by the Statute of *Glouceſt. cap.* 11. Leſſee for Years in *London*, may falſify a Common Recovery, whereby the Judgment is not to be ſtaid, but the Execution ſuſpended during the Term, and this is done by a Writ *De Inquirendo ſuper Statut' Glouc'* and tried in the Huſtings, and extends

to other Towns that have ſuch Courts; but the Statute extends not to any Caſe but where the Leaſe is by Deed, nor to Tenant by Statute *Elegit*, &c. But now the Stat. 21 *H.* 8. *cap.* 15. extends to all Leaſes out of *London*, and by that Statute the Leſſee ſhall be receiv'd to falſify the Recovery before Judgment, and it ſhall ſuſpend the Execution; but then he muſt not only aver the Colluſion, but plead ſome Bar to the Plaintiff's Title; and this Statute extends to all thoſe Caſes where the Vouchee or Tenant lets Judgment go by Default.

*P. 52 * A Fine was levied in order to make a Tenant to the *Præcipe*, and a Writ of Entry brought againſt the Conuſee, who vouches, and Recovery had, and doubted if this be a good Recovery; for the Fine having no Uſe declared, the Uſe reſults to the Conuſor, and ſo here is no good Tenant to the *Præcipe*. Tho' this Caſe has not received a formal Deciſion, as I remember, and Sir *Edward Northey* and Mr. *Poley* were ſtrongly of Opinion the Recovery was void, yet it ſeems, with Submiſſion,

the Recovery is good; for at Common Law a Fine was *Tranſactio Judicialis*, a final judicial Agreement on Record. And though a learned Judge has obſerved it is not a Feoffment of Record, yet it has the Force and Effect of a Feoffment. Now at Common Law, if a Fine was levied without Conſideration, as in a Fine there needs none, the Conuſee was Tenant to all Writs, till the Statutes of Perners of Profits *and Uſes; and by the Statute of Uſes, *P. 53 though the Uſe reſulted back to the Conuſor where no Uſe was declared, yet the Intent of the Parties always guided the Uſe, and there could be no reſulting Uſe againſt the Parties expreſs Intention, ſo that whenever the Uſe reſults, it is becauſe the Parties intended it, ſo not contrary to their Intent, which is the Guide of Uſes, 1 *R.* 100. *a.* 6 *R.* 64. *b.* Now in this Caſe the plain Intent of the Parties here was to make a Tenant to the *Præcipe*, and that is ſhewn on Record, by the Writ of Entry brought againſt the Conuſee, and

the Fine, Recovery and Deed, are all but one Assurance to cut off the Entail. 2 *R.* 72. *b.* 2 *Lev.* 54. *Cro. Car.* 321. *Hardres* 402. And the Reason of the contrary Opinion seems to be, that these Gentlemen took the Statute of Frauds to extend to Uses, which it does not, but only to Trusts; for if a Man buys Land and pays for it, and
*P. 54 * has no Conveyance, but a Fine, without any Declaration of the Use of it, it is certainly good.

Since the foregoing Part, and indeed all this Book was wrote, the following Case has been resolved: *A.* Tenant in Tail, levied a Fine, and after suffered a Recovery, wherein the Conusee was Tenant, who vouched the said *A.* and there was no † Deed to declare the Uses. It was objected, the Use of the Fine resulted to the Conusor, and though the Intent of the Fine was to make a Tenant to the *Præcipe*, yet no Use or Trust can be averr'd since the Statute of Frauds. But Lord Chief Justice *Holt*, and

† Deed] See 1 Atk. 7, 8, 9. touching agreements to suffer Common Recoveries; and touching Deeds to lead the Uses thereof.

and the Court of Queen's Bench, held the contrary; for at Common Law the Uſe was always intended to be to the Conuſee, and was never averr'd in Pleading, unleſs it were to the Uſe of a Stranger; then it muſt be averr'd, and held, the Party was in by the Fine, and a good Tenant to the *Præcipe*, and * that the Statute of Frauds extends not to Uſes that ariſe by Operation of Law, but to ſuch Uſes as are to third Perſons, which are Truſts; and ſince the Statute, neither Conuſor nor Conuſee can by Parol aver the Uſe to a third Perſon. 8 *Ann. B. R.* Lord *Angleſea* againſt Lord *Altham*. *Vide Latch* 257. This Caſe is reported in 2 *Salk.* 676. but he has miſtaken the Year, for it was not 8 *W.* 3. but 8 *Ann.* and alſo in a a Book intitled *Reports of Caſes in Equity*, *f.* 16. * P. 55

I find in ſeveral of the Law Books it is ſaid, that in ſome Caſes a Recovery may be good without a Tenant to the *Præcipe* by Eſtoppel; but this I take

to

to be, where he who ſuffers the Recovery is Tenant in Fee; for Eſtoppels bind not the Iſſue in Tail, becauſe he claims Paramount *per formam Doni*; and ſo is the Caſe of *Bull* and *Wyatt*, 1 *Cro.* 388. One *Riginald* and his Wife ſeiz'd in Fee, *Jure uxoris*, by Indenture let the Land *Habend' a die datus*, *P. 56 * for Life of the Leſſee, rendring Rent, with a Letter of Attorney to deliver Seiſin: The Attorney made Livery the ſame Day, *ſecundum formam Chartæ*: Leſſee enters and pays the Rent: The Wife dies: The Heir before Entry ſuffers a Common Recovery, and the Court held the Leaſe void, and Livery the ſame Day it bears Date void, and urged that the Leſſee entring, and paying the Rent, he is Tenant at Will, and not a Diſſeiſor; but admitting it a Diſſeiſin, and there was no Tenant to the *Præcipe*, yet held he and all claiming under him eſtopped.

By what kinds of Conveyance a Tenant to the *Præcipe* may be made.

To make a good Tenant to the *Præcipe*, in order to ſuffer a Common Recovery,

covery, it may be done either by † Fine, Feoffment, Leaſe and Releaſe, or Bargain and Sale inroll'd; and this latter Way by Bargain and Sale ſeems good before Inrolment, if the Deed be inrolled within ſix Months ‡ by relation; for in a ſtronger Caſe, if a Man bargain and * ſell Land by Deed, and before inrolment the Bargainee doth bargain and ſell again to another, and the firſt Deed is inrolled within ſix Months, the ſecond Bargain and Sale by the Bargainee is good; which ſhews the Freehold was in the firſt Bargainee, otherwiſe he could not transfer it. 2 *Inſt.* 675. *Noy* 106. 2 *Cro.* 53, 409. *Owen* 150. *Dyer* 219. *Moore* 41. yet in Practice, I have known ſome very able Counſel refuſe to let the Recovery be ſuffered till the Deed of Bargain and Sale, that makes the Tenant to the *Præcipe*, is inroll'd, which is certainly the ſafeſt Way, though good, if inroll'd after. 2 *Inſt.* 675.

† Fine] The Tenant to the *Præcipe* was made by a Fine, the Recovery was ſuffered, and the Fine was reverſed, yet in a Writ of Error it was held a good Recovery, for there was a Tenant to the *Præcipe* at the Time.

* P. 57

‡ By relation] See *Selwyn* v. *Selwyn*, 2 Burro. 1134. Where a Recovery ſhall have relation to the Bargain and Sale to make a Tenant to the *Præcipe*: So that when the whole is compleated, both ſhall be conſidered as only one Conveyance to the Uſe *ab initio*.

† If

† If the Tenant to the *Præcipe* be made by Feoffment, Care muſt be taken that Livery be duly made before the Recovery; if it be by Leaſe and Releaſe, it muſt be duly executed before the Recovery, and not helped by antedating it, though nothing is more common among Attornies than to bring the Deeds to *Weſtminſter*, and often execute them after the Recovery taken at Bar.

† By the Stat. 14 Geo. 2. c. 2. every Recovery ſhall be deemed good and valid notwithſtanding the Fine or Deed or Deeds making the Tenant to the *Præcipe* ſhould be levied or executed after the Time of the Judgment given in ſuch Recovery, and the Award of the Writ of Seiſin, provided the ſame appear to be levied or executed before the End of the Term, Great Seſſion, or Seſſion, or Aſſizes in which ſuch Recovery was ſuffered, and the Perſons joining in ſuch Recovery had a ſufficient Eſtate and Power to ſuffer the ſame.

*P. 58 *‡ A Writ of Entry was returnable *Quinden' Martini*, 26 *Nov.* being a *Monday*, the Term ended the *Wedneſday* following; the Leaſe and Releaſe were dated the 26th and 27th of *Nov.* and the Recovery taken on *Wedneſday* the 28th at the Common Pleas Bar, and ill, for it appear'd on the Face of the Recovery, that there was no Tenant to the *Præcipe*, for the Writ of Entry

‡ A Recovery ſuffered under theſe Circumſtances would now be good by the late Stat. 14 Geo. 2.

Entry was returned before the Release bore Date; and though the Prothonotaries, and some able Men held it good, yet on good Advice, it was held Erroneous.

Upon Consideration of the Case above mention'd, the Recovery is certainly void*; for since a Recovery was suffer'd of that Term, on the 26th of *Nov. viz. Quinden' Martini*, it cannot be otherwise presum'd but that the Tenant on that Day appear'd to the Writ, * and Judg- *P. 59 ment was then given, and the Release bearing Date the 27th of *Nov.* it plainly appears there was no Tenant to the *Præcipe*, because Judgment was given *Quinden' Martini*; and though the Recovery was taken at Bar the 28th, and so noted by the Serjeants, yet the Judges take no Notice of that, and of nothing but but what appears on the Record.

Note, By the Circuitiers it is said, that all Deeds to make a Tenant to the *Præcipe*, ought to be dated before the Term, because the Term is one Day in Law,

and all that is done in the Term relates to the firſt Day, and a Deed after cannot be given in Evidence; but that may be eaſily cur'd, by taking an Exemplification of the Writ of Entry.

If Tenant for Years be made Tenant to the *Præcipe*, it does not extinguiſh his Term. 1 *Mod.* 107.

If a Recovery be of long ſtanding, the Judges, who do all they can to ſupport * them, will † preſume there was a good Tenant to the *Præcipe*; and if ſuch a Recovery be given in Evidence, will intend there was a good Tenant to the *Præcipe* at the Time of the Recovery, ſo will preſume a Surrender of Tenant for Life. 2 *Cro.* 455. 2 *Lut.* 1550. 3 *Keb.* 311. 9 *Mod.* 143.

*P. 60

† Preſume] On a Trial at Bar wherein the Validity of two Recoveries in 1714 and 1721 came in queſtion, it was ruled by the Court, that tho' at ſuch a diſtance of Time proper Tenants to the *Præcipe* ſhall be Preſumed, where no Deed appears; yet in this Caſe it appearing that there were Deeds inrolled for *that Purpoſe*, wherein proper Parties did not join, and the Uſes were declared to have been warranted by ſuch Deeds; the Court could not *preſume* there were any others. And ſo directed the Jury to find againſt the Recoveries, which they did accordingly. *Keen* on the Demiſe of the Earl of *Portſmouth et al.* v. the Earl of *Effingham*, 2 Stran. 1267. Eaſter 13 Geo. 2. and ſee 2 Stran. 1129. as to preſuming there was a good Tenant to the *Præcipe*. Where a Perſon has Power to ſuffer a Recovery *omnia præſumuntur Ritè et Solenniter acta* until the contrary appears; but if the contrary appears, there is an End of the Preſumption. See 2 Burro. 1072, 1073, 1074. 2 Lutw. 1549.

CAPUT III.

‡ Who may ſuffer a Common Recovery.

‡ A Papiſt being Tenant in Tail ſuffered a Recovery, and declared the Uſes to himſelf and his Heirs; this is not a Purchaſe within the *Stat.* 11 & 12 W. 3. for it is no new Acquiſition, but only a new Modification of the Family Eſtate. See Comyns 207.

A Recovery may be ſuffered by Tenant in Tail, who has Power to ſuffer it, that is to ſay, he muſt be either Tenant in Tail in Poſſeſſion, or have the concurrence of the Freeholders claiming under the ſame Settlement, and this Principle is adhered to, by the Stat. 14 Geo. 2. c. 20. 2 Bur. 1072. and 1 Bur. 116, 119.

ALL Perſons may ſuffer Common Recoveries, but thoſe diſabled by Law, and this Diſability ariſeth either from the Common or Statute Law. By Common Law † Infants are diſabled to ſuffer Common Recoveries, and to open this Matter, it will be neceſſary to

Comyns 615. 2 Roll. Abr. 395. Weſt. *&c.* Part 2. Sect. 3, 4, 5, 6, 7, 8, *&c.* Titles Fines and Concords, and Recoveries. Sect. 1. Fol. 2, 3. 76. b.

† Infants] In a Marriage Settlement, Huſband made Tenant for 99 Years if he ſo long lived, Remainder to Truſtees during the Life of the Huſband, *&c.* Remainder to the firſt, *&c.* Son by the Marriage in Tail Male, Remainder to the firſt, *&c.* Son of any other Wife, Remainder over.

A Son is born, of Age, the Wife Dead, and there are no other Sons by a ſecond Marriage; the Truſt for preſerving Contingent Remainders deſcends to an Infant; if for the Benefit of the Family, Equity will Decree the Infant Truſtee to join in a Recovery. 1 P. Wm's 536. *Stat.* 7 Ann. c. 19. ſect. 1 & 2. 2 Atk. 559.

*P. 61 * ſee what Privilege the Law allows Infants in Adverſary Writs.

It is natural that thoſe, who, by Reaſon of the Infirmity of their Age, have not the full Uſe of Reaſon, and want Experience in the Management of their Affairs, ſhould be under a legal Diſability of prejudicing themſelves; but as Nature has not fix'd an Age or Time certain when young People come to the Firmneſs of Reaſon, ſome attaining it ſooner than others, therefore for the publick Tranquillity, the Common Law adjudges all Perſons Infants till they are Twenty-one Years old, becauſe till then they are ſuppoſed not to have a Firmneſs of Judgment or Diſcernment capable to manage their Affairs.

The Learning when and in what Caſes an Infant ſhall have his Age, and when not, is of great Extent, and not intended to be handled here, but only to ſhew ſome few Rules for the better underſtanding the Matters in

*P. 62 * hand; and therefore the Common Law allows

allows Age to an Infant in by Deſcent, but not by Purchaſe; the Reaſon is, when he comes to the Land by Deſcent, he is in by Act of Law; but a Purchaſe is his own Act: So an Occupant ſhall not have Age. *Hob.* 239. 1 *And.* 21. 6 *Co. Rep.* 4. It is doubted whether an Infant ſhall have his Age in a *Ceſſavit*. My Lord *Coke*, 2 *Inſt.* 401. 8 *R.* 44. ſeems to be of Opinion that he ſhall have his Age, but *T.* 25 *Edw.* 3. 9. is againſt it; but it ſeems my Lord *Coke*'s Opinion is Law, for this is a Statute highly Penal, and therefore by Equity extends not to Infants; for as in a *Ceſſavit*, the Defendant, by tendering the Arrears, and giving Security, may free himſelf; ſo the Law would be unreaſonable to oblige an Infant to a Tender, when by Intendment of Law he has not Reaſon to know what to tender.

In Attaint, Diſceit or Error, the Parol demurs, not for Non-age, but in Error,

*P. 63 *Error, to reverſe a Fine, the Tenant being an Infant, and in by Deſcent, had his Age. *Jenk. Cent.* 97. 2 *Cro.* 39. 2 *M.* 19 *H.* 6. 25. *Moore* 847. 1 *Rol. Abr.* 251. 1 *Rol. Rep.* 251.

In Dower Age is not grantable, nor in Formedon in Remainder, but in Formedon in Deſcender it is, 6 *R.* 3. Thus to ſeveral Ends and to ſeveral Purpoſes the Common Law privileges Infants from Suits during their Infancy, and in other Caſes not, all grounded on ſolid Reaſon; but in all Suits againſt an Infant, if he appears by Attorney it is Error, for two Reaſons; firſt, becauſe he is preſumed not to have Diſcretion to make one, and the Law will not put it in his Power to hurt himſelf. Secondly, if he be deceiv'd, he has Nobody againſt whom he has Remedy; and for theſe Reaſons, if in a Common Recovery an Infant is Tenant or Vouchee, and appears and pleads, or vouches either in Perſon or by Attorney, it is erroneous.

*roneous. *Stiles* 246. 2 *Roll's Abr.* 396. *P. 64
Cro. Eliz. 158, 172. 1 *Jones* 318.

It was long dubious whether a Common Recovery ſuffer'd by an Infant, by Guardian was good; and in *Mary Portington*'s Caſe, *Co.* 10 *Rep.* 42. the better Opinion ſeems to be that ſuch Recoveries are erroneous; but that Point is now ſettled, and it has been the common Practice to do it by Privy Seal on weighty Reaſons, which has ſome Reſemblance with the Civil Law, where the imperial Authority ſupplies the Defect of legal Age. Upon producing this † Privy Seal to the Court of Common Pleas, they admit a Perſon of known Ability and Integrity to be Guardian, and on ſhewing the Reaſons for ſuffering a Common Recovery, and proving

† Though the King grant a Privy Seal, yet it is in the Diſcretion of the Court, whether they will permit it to paſs: and the Judges do not permit it, but when it will be Advantageous to the Infant; and though it is paſſed, yet it is avoidable by Error. 1 Ld. Raym. 113. See the Caſe of Sir *John St. Albans*, an Infant of 19 Years who petitioned the King for Leave to ſuffer a Recovery, his Siſter who was the next in Remainder and alſo his Heir having married one of his Footmen, the King referred it to the Judges of the Common Pleas, before whom ſeveral Precedents of Recoveries ſuffered by Infants upon Privy Seals were cited; the Judges obſerved that ſeven of the Petitions were by Fathers upon the Marriage of their Sons, and an equal Recompence given; whereas here was neither Father nor Marriage in the Caſe, and they ſaid this Caſe had been carried too far already, therefore diſallowed it. 2 Salk. 567. Vid. Hob. 196. Cro. Car. 307. 10 Rep. 43. a. 1 Roll. Abr. 731. 1 Vent. 73. 2 Sand. 95. 1 Sid. 446. 1 Sid. 321. 1 Lev. 142. 2 Ro. Rep. 85. 5 Mod. 209. 1 Ro. Abr. 755. pl. 6. Godb. 161. 1 Mod. 48. Styl. 246. 2 Vent. 90.

proving that it is for the Infant's Advantage, it is done in open Court. And in this Caſe the Judges have uſed to examine very ſtrictly into the preſent Entails, (and take the Conſent of *P. 65 *thoſe in Remainder) and into the Ends and Purpoſes of ſuch Recovery, and to be attended with the Writings and Parties in Court or at their Chambers, before they admit a Guardian, and ſuffer the Recovery to be paſſed in Court. But then if the Recovery is to be with double Voucher, the Queſtion will be, by what Conveyance the Tenant to the *Præcipe* muſt be made, ſince all Deeds made by an Infant, except a Feoffment, are void, and therefore it muſt be done by Fine or Feoffment; and this Admittance by Guardian, and the Reaſon of it, is grounded on *M.* 9 *Edw.* 4. *Pl.* 10. Writ of Right againſt an Infant who appeared by Guardians, and vouches and loſes, and Judgment given againſt him, and there ſaid, if a Guardian miſbehave himſelf, the Infant has an Action

tion againſt him, and the Court will admit of no Guardian, but ſuch a one as is ſufficient and able to anſwer the * Infant any Loſs or Damage occaſioned by him. * P. 66

But now there are frequent Parliaments where Bills are often paſſed to enable Infants to make Settlements; this Method of Infants ſuffering Recoveries by Privy Seal is ſeldom practiſed.

The next legal Diſability is † Coverture, but the Law does not favour Coverture ſo much as Infancy; and therefore a Recovery by Huſband and Wife is good, antiently as appears by *Mary Portington*'s Caſe, 10 *Rep.* 35. b. On all Recoveries there was a Writ to examine Feme Coverts; and the firſt Mention of ſuch Examination is 43 *Ed.* 3. 18. but now it is wholly ‡ diſuſed in Common Recoveries, though it ſtill remains in Fines.

† The Error aſſigned was that the Vouchee was a Feme Covert and under Age, and appeared by Attorney, and the Recovery was reverſed. 5 Mod. 209.

‡ This is a Miſtake, for the Serjeants at the Bar now examine Feme Coverts when they come to ſuffer Recoveries.

A Common Recovery ſuffered by Huſband and Wife bars the Wife of her Dower, though ſhe has no Recompence.

2 *R.* 74, 78. *Plowd.* 514. I have heard ſome learned Men Queſtion this,
*P. 67 * becauſe the Woman has then no Eſtate in *Eſſe*; but with Submiſſion, the ſame may be ſaid againſt a Fine, and the Common Recovery eſtops her as Party, and the Recovery diſaffirms her Huſband's Title to the Lands of which ſhe was dowable.

If Lands are given to Huſband and Wife, and the Heirs of the Body of the Huſband, Remainder to a Stranger, and the Huſband diſcontinues by Fine or Feoffment, or grants the Land by Leaſe and Releaſe, or Deed of Bargain and Sale inroll'd, and a Writ of Entry is brought againſt Conuſee, Feoffee, or Grantee, and he vouches the Huſband alone, who vouches the Common Vouchee; this Common Recovery is good, and bars the Eſtate Tail and all Remainders, but not the Wife's Eſtate. But if Lands are given to Huſband and Wife, and the Heirs of their two Bodies, Remainder over to a Stranger, and

the Huſband alone diſcontinues, and a * Recovery is ſuffered, this is no Bar to the Entail or Remainders; ſo if Lands are given to Huſband and Wife, and the Heirs of the Body of the Huſband, and the Writ of Entry is brought againſt the Huſband alone, and he vouches the Common Vouchee, this is no Bar to the Entail or Remainders; and the Reaſon is in the firſt Caſe, there is a good Tenant to the *Præcipe*, and Huſband comes in as Vouchee of all Eſtates he ever had. But in the ſecond Caſe the Eſtate Tail and Remainders are not barred, becauſe the Wife having a Joint Eſtate of Inheritance with her Huſband, the Recompence muſt follow the Eſtate, and a Recompence which goes to a Sole Eſtate cannot extend to a Joint Eſtate, as has been obſerved before. And in the third Caſe the Wife has a Joint Eſtate for her Life, and the Huſband ſeized jointly with her, and there being no Moieties between Huſband and Wife, and each having

* P. 68

*P. 69 * the entire Eſtate, the Remainder depends on the particular Eſtate they both jointly have, without Diviſion; and when the Huſband alone takes the Tenancy on himſelf, though it is good by Eſtoppel, yet not according to the Intereſt he has in the Land, and when he is vouched and enters into Warranty, he ſhall be intended Donor of that particular Eſtate which the Tenant had when he vouched, and of no other Eſtate; and this is a ſole Eſtate only by Eſtoppel, and not a Joint Eſtate by Entireties with his Wife; and as the Vouchee comes in, ſo the Recompence goes, which is only to the ſole Eſtate of the Huſband, and not to the Remainder, for that does not depend on a Sole, but Joint Eſtate; ſo that by Reaſon of the Recompence the Remainder is not barr'd, it is at large, notwithſtanding the Eſtoppel, which goes not in Privity to him in Remainder, being
*P. 70 a Stranger to the Tenant; and * there is no Occaſion to falſify, becauſe the

Title

Title is false. 5 *Co. Rep.* 5. 3 *R.* 6. 9 *R.* 140. 2 *Roll. Abr.* 395. *Stiles* 320. 4 *Leon.* 26. 1 *And.* 44. 162. *Gouldſ.* 26. *Dal.* 37.

If Lands are given to Huſband and Wife, and the Heirs of their two Bodies begotten, and a Writ of Entry is brought againſt the Tenant of the *Præcipe* made by them, and they come as Vouchees, and vouch the Common Vouchee, this is a good Common Recovery. So where Lands are given to Baron and Feme, and the Heirs of the Body of the Wife, or to the Wife, and the Heirs of her Body, and a Writ of Entry is brought againſt both, and they vouch the Common Vouchee; ſo if a Man has Land wherein his Wife has a Jointure or Dower, a Recovery bars her. *Plowd.* 514.

Huſband makes a Feoffment to the Uſe of himſelf for Life, Remainder to his Wife in Tail, Remainder to both * their Heirs, and a *Præcipe* againſt him and his Wife, and they vouch Com- * P. 71

mon

mon Vouchee, this Common Recovery bars not the Entail, becauſe he was not ſeiſed of the Eſtate Tail. *M.* 12 *E.* 4. *Pl.* 16. *Dyer* 25, 26. *Owen* 129. If Huſband and Wife be Tenants in Special Tail before Marriage, Remainder to Baron in Tail Male, Remainder to *J. S.* in Fee, Baron alone makes a Deed of Bargain and Sale to make a Tenrnt to the *Præcipe*, who vouches the Huſband, and he the Common Vouchee, and doubted if it barr'd for a Moiety, the Eſtate being made before the Coverture, ſo that there were Moieties between them; but in this Caſe Huſband and Wife died without Iſſue Male, whereby the Special Tail limited to them was determined, and the Huſband having a Remainder to his own Heirs Male, this Remainder was barr'd, and the Remainder to *J. S.* 3 *Lev.* 108. from all which Caſes it may be obſerved, that the Huſ-

*P. 72 *band, whether ſeiſed jointly with his Wife, whether by Moieties or Entireties, or ſeiſed only in Right of his Wife,

Wife, may create an Estate of Freehold during the Coverture, and thereby make a good Tenant to the *Præcipe*, without his Wife's joining; and this now is in constant Experience and Practice, and saves the Charge of a Fine.

Concerning Common Recoveries by Ideots and Madmen.

As to Ideots and Madmen, the Law has so high a Regard to Matters of Record, that a Fine levied, or a Recovery suffer'd by them is unavoidable; and to prove this, there is a notable Case, *Hugh Lewis*, in Consideration of 60 *l.* enfeoffs *J. Williams* of the Manor of *D.* and *J. Williams* is bound to *Hugh Lewis* in a Bond of 100 *l.* for Payment of 50 *l.* *J. Williams* devised the Manor to *William Wynne* and his Heirs, and dies, *William Wynne* pays the 50 *l.* to *Hugh Lewis*, who levies a Fine of the said Manor to *William Wynne*, and by Office found *Hugh Lewis* was an * Ideot *a Nativitate*, and held the Fine good, for both *Hugh* and his Heirs are estopped to say he was an Ideot; and the Court would rather Judge the Office

* P. 73

fice void, than bring this judicial Act in Queſtion, or the Judgment of the Court that accepted the Fine. 2 *And.* 163.

Tenant in Tail attainted, diſabled to ſuffer a Recovery.

Attainder is a legal Diſability; and therefore if Tenant in Tail be attaint, and an Office found, the Land granted to *A.* who ſells it to *B.* who ſuffers a Common Recovery, and therein vouches Tenant in Tail, the Remainders are not barr'd. *Godb.* 218. But *Allen* in 1 *Keb.* 30. *contra Arguendo*, 1 *Keb.* 398. But notwithſtanding the Opinion in *Godb.* yet it ſeems there is ſuch a *Scintilla Juris* in the Tenant in Tail, after an Attainder, that by a Common Recovery, if there be a good Tenant to the *Præcipe*, he may bar the Iſſue, Reverſions and Remainders; for if the King pardon the Party, and reſtore the *P. 74 * Land, though the Attainder is in Force, he may bar the Entail.

An Alien Tenant in Tail, where his Recovery barrs.

Alien is alſo another legal Diſability, and if an Alien be Tenant in Tail, this is a good Eſtate Tail, but not deſcen-

dible

dible to his Issue, 9 *R.* 141. But if Lands are given to an Alien in Tail, Remainder to *C.* in Fee, the Alien suffers a Common Recovery, and after an Office is found, this Recovery bars *C.* and the King has a good Fee; for till Office he was seised, and there was a good Tenant to the *Præcipe*. *Godb.* 102. *Noy* 137.

The King cannot suffer a Common Recovery.

Besides these natural and legal Disabilities before-mentioned, Conveniency, Decency and Order hinder some from suffering Recoveries, and therefore the King cannot suffer a Common Recovery, for if he suffer a Common Recovery, he must be Tenant or Vouchee; and in both Cases the Demandant must count against him, and there must be Judgment against him, which the Law * does not suffer, so cannot come in as Tenant by Receipt; but if the Party have any Warranty, he must pray him in Aid. 1 *Cro.* 96, 97.

* P. 75

Perſons diſabled by Statute.

Other Perſons diſabled are thoſe that for ſome particular Reaſons are ſo by Act of Parliament, occaſioned by the Abuſe of Common Recoveries: And

11 H. 7. c. 20.

firſt by the 11 *H.* 7. *cap.* 20. whereby it is enacted, That if any Woman which had or hereafter ſhould have any Eſtate in Dower for Life, or in Tail jointly with her Huſband, or only to herſelf, or to her Uſe, of any Manors, &c. of the Purchaſe or Inheritance of her Huſhand, or given to the Huſband and Wife in Tail, or for Life, by any the Anceſtors of the Huſband, or any other Perſon or Perſons ſeiſed to the Uſe of the ſaid Huſband, or of his Anceſtors, and have or ſhall hereafter, being Sole, or with any after taken Huſband ſuffer a Recovery, &c. then the Recovery to be void, and that then

*P. 76

*it ſhall be lawful to the Perſon or Perſons, &c. to whom the ſaid Manors, &c. belong, after the deceaſe of the ſaid Woman, to enter, &c. provided this Act extend not to any Recoveries had with

with the Heir next inheritable to the Woman, nor where he or they that next after the Death of the said Woman should have the Estate of Inheritance in the said Manors, &c. be assenting or agreeing to the said Recoveries, where such Assent is of Record, or inroll'd.

This Act was made to Remedy a very great Abuse crept in by the frequent Use of these Common Recoveries; for being now become one of the Common Assurances of the Realm, and the common Method used to bar Entails, Jointresses who had been advanced by their Husbands, and had Estates Tail limited to them by their Husbands, or their Ancestors, and which Estates were designed for the Benefit of their Issue, * frequently used these Common Recoveries, among other Discontinuances this Statute mentions, and thereby gave these Estates from their Issue and Husband's Family. To remedy this Abuse this Act was made; and to prevent, * P. 77

not only every Bar, but every Diſcontinuance, and to preſerve the Entail for the Benefit of the Iſſue inheritable by Force of it; and therefore if *A.* makes a Feoffment in Fee to the Uſe of himſelf and his Wife, and the Heirs of their Bodies lawfully begotten, *A.* has Iſſue *B.* and dies, the Feme is diſſeiſed, *B.* releaſes to the Diſſeiſor, and has Iſſue *C.* Feme releaſes to the Diſſeiſor, with Warranty, Diſſeiſor ſuffers a Recovery, and vouches Feme; *B.* dies, his Iſſue may enter. 3 *R.* 59.

If Tenant in Fee marries, and has Iſſue a Son, the Wife dies, Baron takes a ſecond Wife, and ſettles his Eſtate on himſelf and his Wife, and the Heirs of their two Bodies lawfully to be begot-
*P. 78 * ten, and has Iſſue another Son, and dies, the Mother and her Son make a Tenant to the *Præcipe*, againſt whom a Writ of Entry is brought, and he vouches the Mother, and ſhe her Son, and he the Common Vouchee; this is a good

Common

Common Recovery, and bars the Eſtate Tail, and all Remainders and Reverſions; for the Intent of the Act was not to ſave the Eſtate only for him that was Heir apparent, but for the Iſſue of that Entail; and the Proviſo of the Act extends to him next inheritable, and that is in this Caſe, the Iſſue in Tail, 3 *R.* 59. 1 *Jones* 31. *Hob.* 332. *Mac Williams*'s Caſe, which was this very Caſe, but turned on another Point; and wherever the Heir in Tail conveys or aſſures the Land to another, and the Wife releaſes or confirms with Warranty to perfect the Aſſurance, it is not within this Act. 3 *R.* 60.

If a Man makes a Feoffment in Fee to the Uſe of himſelf and his Wife *in Tail, Remainder to the Huſband in Fee, and dies, and leaves a Daughter, his Wife enſeint with a Son, the Reverſion deſcends to the Daughter, though the Mother and Daughter join in a Recovery, yet this is void as to the afterborn Son. 3 *R.* 61. * P. 79

To

To bring the Feme within the Compaſs of this Act, the Proviſion muſt come purely from the Baron or ſome of his Anceſtors; and therefore if one be ſeiſed of Lands in Fee, and has Iſſue two Daughters, and on the Marriage of one agrees, in Conſideration of 150 *l.* and the Marriage, to levy a Fine to the Huſband and Daughter, and the Heirs of the Body of the Daughter, if the Huſband dies, leaving Iſſue by her, ſhe may by Common Recovery bar this Entail; for it is out of the Act, being a Proviſion made by her Father, and the Conſideration of 150 *l.* was not regarded. But if Huſband and Wife in this Caſe ſell the Land, and
*P. 80 * purchaſe other Land with the Money, and ſettle it as aforeſaid, this is within the Statute, and ſhe cannot by a Common Recovery bar the Iſſue, for the Money was the Huſband's, and this a Purchaſe made by him within the Statute. *Palm.* 21, 32, 216, 217. 1 *Jon.*

Jon. 13, 254. 2 *Cro.* 624. *Cro. Car.* 244. *Plowd.* 464. 1 *Inſt.* 366.

A Man ſeiſed of Land in Fee, levied a Fine to the Uſe of himſelf for Life, and after † to his Wife in Tail General, Remainder to a Stranger in Fee; this is within the Words of the Act, and out of the Intent of the Act; for limiting the Eſtate to her and the Heirs of her Body, with Remainder to a Stranger, ſhews he meant any Iſſue of her Body ſhould inherit by any other Huſband. *Cro. El.* 2.

† A Man ſeiſed of Lands in Fee deviſes the ſame to his Wife in Tail General, Remainder to *J. S.* in Fee, and the Wife with an after taken Huſband ſuffers a Recovery; held good againſt the Heir of the Deviſor, for altho' this Caſe is within the Letter of the Stat. 11 H. 7. c. 20. yet it is not within the Intent of the Statute, which extends only to Caſes where the Huſband ſettles Lands upon his Wife by Way of Jointure, to which the Iſſue between them ſhall be Inheritable. *Hughs* v. *Clubb.* Comyns 369. See 4 Rep. 3. Dyer 248. Cro. Eliz. 524. Moore 716.

A Man ſeiſed of Lands in Fee levied a Fine to the Uſe of himſelf for Life, and after to his Wife and the Heirs of her Body by him begotton, they both * having Iſſue, ſuffer a Recovery; and 1 *Inſt.* 365. *b.* ſaid it is void; ‡ but I

* P. 81

‡ *A.* covenanted to ſtand ſeiſed to himſelf and his Wife for their Lives, Remainder to the Heirs Male of *A.* on the Wife begotten, *A.* cannot Dock this during the Wife's Life. 2 Salk. 568.

A Recovery cannot be ſuffered to bar an Entail where there is an Eſtate for Life in Jointure. 5 Mod. 211.

cannot

cannot see how this can be Law, for the Husband and Wife joining, may bar their Issue by a Recovery. 2 *Cro.* 475.

A Man seised *Jure Uxoris*, they two levy a Fine, and Conusee grants and renders the Land to them in Special Tail, Remainder to the right Heirs of the Husband, they have Issue, and the Husband dies, she marries again and suffers a Common Recovery, this is within the Letter, but out of the Meaning of this Act, which extends not to any Case but where the Estate is by Gift or Conveyance of the Husband or his Ancestors; and here originally the Estate moved from the Wife.

If there be Great Grandfather, Grandfather, Father and Son, and the Great Grandfather seised *Jure Uxoris* before the Statute of Uses, settles the Estate to the Use of the Grandfather for Life, Remainder to his Wife for * Life, Remainder to the Father and *C.* his intended Wife, and the Heirs of their two Bodies, Remainder to the Son in Tail;

* P. 82

Great Grandfather dies, and then the Statute of Uſes is made, his Wife enters, Father dies, and *C.* his Wife, with an after-taken Husband, ſuffers a Common Recovery, and held to be within the Meaning of this Act; for the Land was the Great Grandfather's, and the Settlement equivalent to an immediate Gift made to the Father and his Wife, and the Donors are the Baron's Anceſtors. *Bendloe* 40.

If the Baron alone ſuffers a Recovery of the Wife's Lands, ſhe may enter after his Death; for as the Stat. 11 *H.* 7. hinders the Diſcontinuance of the Wife, ſo 32 *H.* 8. *c.* 28. makes the Huſband's not prejudicial to the Wife, who at Common Law was on a Diſcontinuance put to her *Cui in Vita*, but by this Statute may enter. 2 *Inſt.* 681.

* The next Stat. that diſables particular Perſons from ſuffering Common Recoveries, is 33 *H.* 8. *cap.* 31. whereby a Common Recovery ſuffered by Tenant for Life, without the Conſent of him

* P. 82 Stat. 32 H. 8. cap. 31.

in Remainder or Reversion, was made void. This Statute is at large in *Rastal*, printed in 1618. By this Act all Recoveries against Tenant for Life or by the Curtesy, &c. are void; but if after this Act Tenant for Life had made a Lease for years, and the Lessee had made a Feoffment, and a *Præcipe* had been brought against the Feoffee, and he had vouched Tenant for Life, this was out of the Statute, because Tenant for Life was not then seised for Life, and had only a Right, and the Estates in Remainder and Reversion were turn'd to a Right; and at Common Law a Recovery against Tenant for Life with Voucher on a lawful Warranty, with a Recovery in Value, was a Bar to him in Remainder or Reversion, which this
*P. 84 * Statute remedied; and the Reason was, because the particular Estate and Remainder were but one Estate and one Warranty extended to both, and so the Recompence in Value extended to both Estates. 10 *R.* 44, 45. But this Statute

Statute is repealed by the Stat. 14 *Eliz.* *c.* 8. which makes fuller Proviſion for avoiding Recoveries ſuffer'd by † Tenant for Life, and ſuch others.

† Tenant for Life ſuffers a Recovery, and after reverſes it by a Writ of Error; the *Forfeiture* remains. Skin. 74.

The next Statute relating to Common Recoveries is 34 & 45 *H.* 8. *c.* 20. whereby it is enacted, that if the King give any of his own Manors, Lands, &c. or cauſe or procure another in Conſideration of Money or other Lands, to give any Manors, &c. to any of his Subjects or Servants in Tail, in Recompence of their Service, Remainder to the King in Fee-ſimple or Fee-tail, ſuch Eſtates Tail are not to be barr'd; for thereby it is enacted, That no feigned Recovery hereafter to be had by Aſſent of Parties, againſt any Tenant or Te-
* nants in Tail, of any Lands, Tenements and Hereditaments, whereof the Reverſion or Remainder at the Time of ſuch Recovery had, ſhall be in the King, ſhall bind or conclude the Heirs in Tail; but

Stat. 34 & 35 H. 8. cap. 20.

* P. 85

that after the Death of every ſuch Tenant in Tail, againſt whom ſuch Recovery ſhall be had, the Heirs in Tail may enter, hold and enjoy the Lands, &c. recovered according to the Form of the Gift in Tail, the ſaid Recovery notwithſtanding.

It is *vexata Quæſtio*, how far at Common Law a Remainder veſted in the King was deveſted by Recovery and Diſcontinuance; and this very Act was made to prevent theſe Recoveries binding the Iſſue, but extends only where the Gift was by the King or his Procurement. Before the Statute *de Donis*, when the King created a conditional Fee, there was no Reverſion, but a Poſſibility in the King; and if the Donee had Iſſue, and aliened, the King's Poſſibility
*P. 86 * was barr'd, as well as that of a common Perſon; but the Statute *de Donis* turned that Poſſibility into a Reverſion, ſo that the Queſtion is, if, at this Day, one make a Gift to *A.* in Tail, Remainder to *B.* in Tail, Remainder to the King

King in Fee; if in this Case *A.* suffers a Common Recovery, this bars *A.* and his Issue, and the Remainder to *B.* but not the King's Reversion, for that cannot be discontinued or put to a right, or pluck'd out of him by the Act of a third person; and therefore the Difference seems to be, that by an Act in Law a Remainder or Reversion may be devested out of the King, but not by Act of the Party; as if there be Tenant in Tail, Remainder to *A.* in Fee, Tenant in Tail discontinues in Fee, and takes back an Estate to himself for Life, Remainder to the King in Fee, Tenant in Tail dies, the Issue is remitted, and the Remainder pulled out of the King, and vests in *A.* but the Act * of the Party as a Fine or Common Recovery, shall never devest any Estate, Remainder or Reversion out the King; but if a Recovery be on good Title against Tenant in Tail, and the King has the Remainder by defeasible Title, there it shall devest the Remainder out

* P. 87

1 Lutw. 848, 849.

of

of the King, and reſtore and remit the right Owners. *Plowd.* 483, 553. *Dyer* 344. 2 *R.* 53. 8 *R.* 76. 1 *Inſt.* 354. 2 *Roll. Abr.* Tit. *Common Recovery*, 393. 394.

Moore 344. Sir *Hugh Cholmeley's* Caſe.

In the Reſolution of that Caſe, the Court was of opinion all was barr'd till it came to the Crown; and ſo is *Brooke*, Tit. *Aſſurance*, *Pl.* 6. and ſo is the common Opinion, that the Crown is not barr'd.

If one make a Gift in Tail, and the Crown deſcend to him; or if the King's Anceſtor, not being King, make a Gift in Tail, and the Reverſion deſcends to him, the Eſtate Tail may be barr'd. 2 *R.* 15. If a Man makes a Gift in *Tail, Remainder in Fee, he in Remainder grants his Eſtate to another for Life, Remainder to the King in Fee, on Condition to be void on Payment of Money: A Recovery by Tenant in Tail bars the King's Remainder and Condition; for the Grant was void. 2 *R.* 52. *Noy* 132. *Yelv.* 149. 1 *Leon.* 8.

*P. 88

But

But if Tenant in Tail of the Gift of the King, makes a Gift in Tail, the ſecond Donee is not within the Statute; for his Eſtate, as far as it could diſaffirm the Reverſion of the King, though it could not take it out of him, and his Poſſeſſion, was injurious to the Eſtate given by the King. *Jones* 251.

If the King grant an Eſtate Tail, reſerving the Reverſion to himſelf, and after grants the Reverſion to another; Tenant in Tail may ſuffer a Common Recovery, and thereby bar the Reverſion.

If a Subject, by the King's Proviſion or Procurement, makes a Gift in * Tail, and then grants the Reverſion to the King for Life or Years only; in this Caſe the Eſtate Tail, Remainders and Reverſions may be all barr'd by a Common Recovery. * P. 89

If there be Tenant in Tail, Remainder or Reverſion in Fee to another, and he in Remainder or Reverſion, by Deed of Bargain and Sale enrolled, bargain

and ſell his Reverſion to the King; or if one covenant to ſtand ſeiſed to divers Uſes, Remainder to the King in Fee, if Tenant in Tail, in either of theſe Caſes ſuffers a Common Recovery, this bars theſe Reverſions.

In the Earl of *Cheſterfield*'s Caſe, it was held by all the Judges of *England*, that if the King make a Gift in Tail, ſaving the Reverſion to himſelf, and afterwards give Leave to the Tenant in Tail to ſuffer a Common Recovery, and to that Intent the King grants the Reverſion to others on Truſt, after the Recovery had, to re-convey it to him,

*P. 90 * the Tenant in Tail ſuffers a Common Recovery, this bars the Entail and Reverſion, and is not within this Statute, becauſe the Reverſion was once ſevered from the Crown, and the Privity of Eſtate gone; and the Statute muſt be intended to reſtrain Common Recoveries, where the Reverſion is in the ſame Plight that it was at firſt, without any Alteration. *Hard.* 409.

In

In the great Caſe of the Earl of *Derby*, the Queſtion, among others, was, If an Eſtate Tail created by King *Richard* III. which after by a private Act, of the Fourth of *James* I. was limited otherwiſe to the Heirs Male of that Family, Reverſion in the Crown, was within this Statute? And the Judges were of Opinion, that notwithſtanding this private Act of Parliament made ſome Alteration, *(viz.)* the Tenants in Tail to be Tenants for Life, with Remainders to their Sons in Tail Male, yet all theſe Limitations being within * the Compaſs of the firſt Entail, as the King was Donor, the Iſſue could not be barr'd by Fine or Common Recovery. *Raym.* 338. * P. 91

If the King, in Conſideration of Money, or other Conſideration by Way of Proviſion, procure a Subject to ſettle his Lands on one of his Servants in Tail, for Recompence of Service, by Deed of Bargain and Sale inrolled, with Remainder to the King in Fee; and all this appears on Record, the Tenant in Tail

cannot by a Common Recovery, bar his Iſſue; and the latter Words of this Act (had done or ſuffered by or againſt any ſuch Tenant in Tail) muſt be intended where Tenant in Tail is Party or Privy to the Act, be it by doing or ſuffering that which ſhould work the Bar, and not by mere Permiſſion. As if Tenant in Tail of the Gift of the King, Reverſion to the King expectant, is diſſeiſed, and Diſſeiſor levy a Fine, and five Years paſs, this bars the Eſtate Tail. And ſo if a collateral Warranty
*P. 92 * be made by the Anceſtors of the Donee, and the Donee ſuffer the Warranty to deſcend without any Entry made in the Life of his Anceſtor; this binds, becauſe he is not Party or Privy to any Act either done or ſuffered by or againſt him. 1 *Inſt.* 373. *Moore* 467. *Sid.* 166. *contra.* 3 *Cro.* 595. 1 *Cro.* 13. 11 *R.* 78. *Yelv.* 72, 73, 74. 8 *R.* 77. 1 *And.* 46. *Vide* in the Appendix a notable Caſe on this Stat. in the Earl of *Derby*'s Family.

Stat. 14 Eliz. cap. 8. The next Statute relating to Common Recoveries is 14 *Eliz. c.* 8. whereby

by it is enacted, that all Recoveries had or proſecuted by Agreement of Parties, or by Covin, againſt Tenant by the Curteſy, Tenants in Tail, after Poſſibility of Iſſue extinct, for Term of Life or Lives, or Eſtates determinable on Life or Lives of any Lands, Tenements and Hereditaments, whereof ſuch particular Tenants are ſo ſeiſed, or againſt any other, with Voucher over of ſuch particular Tenants, or of any having Right or Title to any ſuch * particular Eſtates from henceforth (as againſt the Reverſioners or them in Remainder, or againſt their Heirs and Succeſſors) ſhall be clearly void; provided this Act ſhall not prejudice any Perſon that ſhall by good Title recover any Lands, &c. without Fraud, by Reaſon of any former Right or Title. Alſo every ſuch Recovery had by the Conſent or Agreement of the Perſon in Reverſion or Remainder, appearing of Record in any of the King's Courts,

* P. 93

ſhall be good againſt the Party ſo aſſenting.

Though the Stat. 32 *H.* 8. provided ſufficiently againſt Common Recoveries ſuffered by Tenant by the Curteſy, Tenant *Apres* Poſſibility, Tenant in Dower or for Life, yet ſeveral Inventions were ſet on Foot to evade that Act, all which were fully remedied by this Act, 14 *El.* and therefore if any of theſe Tenants now ſuffer Common Recoveries, either as immediate Tenants or as
*P. 94 * Vouchees, without the Aſſent, and to the Prejudice of him in Reverſion or Remainder, ſuch Recoveries are void, and bar not the Reverſion or Remainder, and are Forfeitures; ſo that if Tenant for Life be made Tenant to the *Præcipe*, or comes in as Tenant in Law by Voucher, the Recovery is void; but if he in Remainder agrees, then it is good. So if there be Tenant for Life, Remainder in Tail to *A.* Remainder to *B.* with divers Remainders over, and a *Præcipe* is brought againſt Tenant for Life,

Life, who vouches *A.* and he the Common Vouchee, this is a good Recovery, and bars all Entails, Reverſions or Remainders. So if one ſeiſed of Lands in Fee, and has Iſſue two Sons, *A.* and *B.* by his firſt Wife, and a Daughter by his ſecond Wife, and deviſe his Land to his Wife for Life, Remainder to *B.* in Tail, and dies; in this Caſe the Reverſion deſcends to *A.* his eldeſt Son. If a Writ of Entry is brought againſt *the Wife, and ſhe vouches *B.* who vou- *P. 95
ches the Common Vouchee, this is a good Common Recovery, and bars the Remainders and Reverſion, though the Heir in Reverſion never aſſented. If a Writ of Entry is brought againſt Tenant for Life, and he makes Default after Default, and then the next in Remainder is received, or if he prays in Aid of them next in Remainder or Reverſion, and they vouch over, this is a good Recovery. And though the Stat. 11 *H.* 7. 32 *H.* 8. 35 *H.* 8. ſay the Recovery ſhall be void, that is, only to

the Heir, Iſſue or Remainder-Man, as the Caſe happens, but it is good among the Parties.

As to Eccleſiaſtical and Spiritual Perſons, as Archbiſhops, biſhops, Dean and Chapters, Prebendaries, Parſons, &c. a Common Recovery by them is prohibited, as well as other Alienations, by ſeveral Acts of Parliament.

---

*P. 96

*CAPUT IV.

Of what Things a Common Recovery may be ſuffered.

A Common Recovery being a Common Aſſurance, may be ſuffer'd of all Things that a Writ of Covenant for levying of a Fine lies; only it lies not *De Foſſato Stagno Piſcar' Carocat' terræ Eſtoveriis Homagio Fidelitate Servitiis*

Shep. Touch. 41.

vitiis faciend' de bovata terra Mariſc' ſe-lione terræ Gardin' Cotag' Crofto virgat' terræ Fodina Minera Mercat'; though Uſe has altered this in ſeveral Points: But a Common Recovery may be of an Honour, Iſland, Barony, Caſtle, Meſſuage, Curtilage, Dove-houſe, Land, Meadow, Paſture, Underwood, Chapel, River, County, Warren, Rectory, View of Frankpledge, Waiſe, Eſtray, Felons Goods, *Deodands, Furze, Heath, Moor, Tithe, &c. *P. 97

It may be alſo of an Advowſon, 4 *R.* 74. ſo *de annua Penſione ſive redditu*, becauſe Common Recoveries are Common Aſſurances. 5 *R.* 40. *Pop.* 22

This muſt be underſtood of an Advowſon appendant to a Manor; but I do not ſee how it can be of an Advowſon in Groſs,

† ſince the Parſon has the Freehold, and therefore it ought not to be by Writ of Entry *in le Poſt*, but by Writ of *Droit de* Advowſon; and has been and is ſo practiſed, except by ſome few Attornies who Act without Knowledge or Advice.

† In the Caſe of *Bayley* v. *The Univerſity of Oxford*, C. B. Eaſter 33 Geo. 2. The Queſtion was, Whether a Common Recovery ſuffered of an *Advowſon in Groſs* and one Acre of Land in a Writ of Entry *ſur Diſſeiſin in le Poſt*, was good in point of Law as to the *Advowſon in Groſs*; upon ſearching for Precedents, Sixteen were found where Recoveries of *Advowſons in Groſs* and a little Land had been ſuffered upon Writs of Entry *ſur Diſſeiſin in le Poſt*; and no Caſe was to be found where ſuch a Recovery was ever held bad. The Court refuſed to hear any Argument againſt this Recovery, but ſaid that if this was *res integra* (perhaps) it might not be right, yet *quod fieri non debuit Factum valet*. And the Court gave Judgment that the Recovery was good. 2 Wilſon 160.

22. 2 *Vent.* 32. 2 *Roll. Rep.* 67. So it may be of a Rent *de Novo*; and therefore if one grants a Rent to *B.* in Tail, Remainder to *C.* in Tail, by a Common Recovery, the Remainder to *C.* may be barr'd. *Sid.* 285. 2 *Keb.* 55. But if one grants a Rent in Tail to *B. B.* ſuffers a Common Recovery to the Uſe of *C.* and his Heirs. *B.* dies without Iſſue, the Rent is determin'd, † becauſe by the Common Recovery the Rent cannot be inlarg'd to the manifeſt Prejudice of the Tertenant, and the Recovery cannot give the Rent a longer Continuance than the Grantor gave it. 2 *Lutw.* 1225. 3 *P. Wms.* 230. *S. P.*

† See 2 P. Wms. 230. where it's ſaid it paſſes a determinable Fee.

By a Common Recovery a reputed Manor may paſs, 1 *Lev.* 28. So Lands * within a Liberty; as if *S.* and *C.* be two adjacent Towns, and Tenant in Tail of Lands in both Towns being within the Liberty of *S.* ſuffers a Common Recovery of Lands in both Towns, but the Record is only in the Town of *S.* and Liberties thereof, yet held good

*P. 98

to

to paſs the Lands in *C.* Sir *Robert Otway*'s Caſe, 2 *Vent.* 32.

The Pariſh of *Ribton* and Vill of *Ribton*, but the Vill not co-extenſive with the Pariſh, *J. S.* was ſeiſed of Lands in Tail in the Pariſh and out of the Vill, and by Indenture of Bargain and Sale inroll'd, covenants to levy a Fine and ſuffer a Common Recovery of Lands in the Pariſh of *Ribton*, which were levied and ſuffered, but the Fine and Recovery were only of Lands in *Ribton*; and argued that this would not extend to Lands in the Pariſh of *Ribton*, becauſe Diviſion of Pariſhes is only an Eccleſiaſtical Conſtitution, and that of Towns and Vills Civil; and where a * Place is named in a Record, it is only intended of what is Civil; but held by the Court, that this being in the Caſe of a Common Recovery, which is a Common Aſſurance, ſhall have a favourable Conſtruction, and the Deed, Fine and Recovery are all one Aſſurance, and held good, and that the 2 Mod. 233. S. P.

* P. 99

Lands paſſed. *Hard.* 225. *Cro. Car.* 206. 1 *Mod.* 206. *Hutt.* 106. *Cro. Car.* 270. 1 *Jon.* 309.

A Recovery may be of Lands in a Place known, though it be neither a Vill or Hamlet, as well as a Fine may be of Lands in a *Lieu Conus.* 2 *Mod.* 49.

If a Man have a Moiety or third Part of Lands, and ſuffer a Common Recovery of the whole, the Moiety or third Part paſſes, and ſhall be to ſuch Uſes as are declared of the Common Recovery. So if Lands are given to two, and the Heirs of their Bodies, Remainders in Tail, one ſuffers a Reco-

*P. 100 * very of the whole; in that Caſe, as well the Tenant as Vouchee, may by pleading abate the Writ: But if the Writ is admitted good, the Moiety well paſſes to ſuch Uſes as are declared by the Deed that leads the Uſes of the Common Recovery, and the Jointure is ſevered, 3 *R.* 3. So if one ſeiſed of a third Part of Land, bargains and

ſells a Moiety, and a Common Recovery is had of a Moiety, this is a good Recovery of an entire Third, and not of a Moiety of a third Part. *Cro. Car.* 110.

Recovery of Copyhold Eſtates.

Copyhold Eſtates being by Law Tenancies at Will, *ſecundum conſuetudinem Manerii*, and being in their Inſtitution only impleadable in the Lord's Court, Common Recoveries are not ſuffered of them in the Court of Common Pleas. It was long *Agitata Quæſtio*, whether Copyholds were within the Statute *de Donis*, and might be entail'd. My Lord *Coke*, in *Heydon*'s Caſe, 3 *R.* 8. is of * Opinion, that Copyholds could not be entailed without a Cuſtom, and that the Statutes co-operating with the Cuſtom, they might; this is, indeed, a little dark and unintelligible. But my Lord *Hale* was of Opinion, they were within the Statute of Intails, and might be intailed as well as other Lands, 3 *Lev.* 327. And indeed this ſeems rational; for as *a Copyholder* of Inheritance

*P. 101

Cuſtom of a Manor to bar Intails of Copyhold Lands by Recovery or Surrender in Fee is good. See the Caſe of *Everal* v. *Smalley*. 2 Stran. 1197. and 1 Wilſon 26. S. C.

had Power by Surrender to make any Eſtate; ſo when Intails were legitimated, it ſeems no way contrary to Reaſon, that he might limit an Eſtate Tail. The Books indeed are very unſettled, and many learned and elaborate Arguments on both Sides, but the better Opinion ſeems to be, that they may be intailed without a Cuſtom; but yet though they may be intailed without a Cuſtom, yet no Recovery can be had of them at † Common Law, as well becauſe in the Eye of the Law, they are only Tenancies at Will, as becauſe the Copy-* holder cannot make any Tenant to the *Præcipe*, but by Surrender. The Way therefore to ſuffer a Recovery of a Copyhold intailed, is either by committing a Forfeiture, as in *Grantham* and *Copley*'s Caſe, where one *William Savill*, being Tenant in Tail of a Copyhold, makes a

† Common Law] A Recovery in the Common Pleas will not paſs Copyhold Lands: but a Recovery in the Common Pleas of cuſtomary Freeholds paſſing by Surrender in a Borough Court may be good of ſuch Lands. *Oliver* v. *Taylor* 1 Atkyns 474. July 13, 1738. and ſee the ſame Book, what Eſtate or Intereſt is not barred by a Fine or Recovery, Tit. *Fine and Recovery*.

* P. 102

a voluntary Leaſe for twenty-one Years, without Licence of the Lord, in order to commit a Forfeiture. The Leaſe was preſented at the next Court, and the Lands ſeiſed into the Lord's Hands, and *William Savill* appointed the Forfeiture to be to the Uſe of *Arthur Savill* and his Heirs, and a Cuſtom found that theſe Forfeitures were uſed to bar Intails, and held good. 2 *Saund.* 422. And in the Caſe of *Pilkington* and *Stanhop*, the Cuſtom was, Tenant in Tail ſhould commit a Forfeiture, then the Lord to make three Proclamations, and ſeiſe the Copyhold, and then to grant it to the Copyholder and his Heirs. And another Cuſtom to bar Eſtates * Tail and Remainders, which was, if Tenant in Tail made a Surrender to the Purchaſor and his Heirs, the Purchaſor committed a Forfeiture, on which the Lord ſeiſed, and on the Proclamations made, the Eſtate Tail and Remainders were barr'd. *Sid.* 315. 1 *Keb.* 752. 2 *Keb.* 127. and where there

* P. 103

there is none of theſe Cuſtoms, the uſual Way to bar an Intail is thus: Tenant in Tail of the Copyhold Eſtate ſurrenders to one to make him Tenant to the *Præcipe*, *id eſt*, to a Plaint, who is admitted, and then a Plaint in the Nature of a Writ of Entry in the Poſt is brought againſt him, who vouches the Tenant in Tail, and he the Common Vouchee, and ſo a Recovery had; then the Recoveror ſurrenders to the Uſe of Tenant in Tail and his Heirs, who is admitted accordingly, and thereby the Eſtate Tail and Remainders barr'd. *Coke Ent.* 206, 207. *Pl.* 10.

*P. 104 * As to Recovery of Lands in Antient Demeſne, the Common Recovery is good, and ſtands in Force till reverſed by the Lord, by Writ of Diſceit, 4 *Leon.* 123. as in the Caſe of a Fine levied of Antient Demeſne Lands.

A Recovery of a Truſt Eſtate is good without a Tenant to the *Præcipe*.

A Recovery may be had of a Truſt Eſtate, as where † *Ceſtuy que Truſt* in Tail

† Ceſtuy que Truſt] A Limitation in a Will to *C.* and his Heirs to the Uſe of him and his Heirs, in Truſt to pay Debts; and after, in Truſt for *D.* and the Heirs of his Body; and in Default of the Heirs of the Body of *D.* Remainder to *C.* and his Heirs; The Recovery of *D.* barred the Remainder to *C.* as being

Tail is in Poſſeſſion with Remainders over, under the Truſtees, who have the legal Eſtate, and ſuffers a Common Recovery; though in this Caſe there be no good Tenant to the *Præcipe*, yet this Recovery will bar both the Eſtate Tail and Remainder and Reverſion; for a Truſt being a Creature of Equity, any legal Conveyance or Aſſurance of *Ceſtuy que Truſt* ſhall have the ſame Effect and Operation on the Truſt as it ſhould have had on the Eſtate in Law, in Caſe the Truſtees had joined; for otherwiſe, Truſtees by refuſing to join, or not being capable to execute the Truſt, might hinder the Tenant in Tail of * that Liberty to diſpoſe of his Eſtate and bar the Intail, Remainders and Reverſion thereon expectant, which the Law gives him as incident to his Eſtate, 2 *Chanc. Rep.* 63, 79. And ſo was the Caſe of *Eaton* v. *Collier*, ſolemnly argued at the Rolls, 17 *Decem.* 1701. which I heard and obſerved, and is now the conſtant Practice of Equity, which probably

ing a Remainder of a *Truſt Eſtate*; for a Remainder of a *legal Eſtate* cannot be barred by a Recovery of *Ceſtuy que Truſt only*. 1 Atkyns 473. *Robinſon* v. *Cuming*, May 12, 1739.

* P. 105

1 Vern. 13, 226, 440. 1 P. Wms. 91. 2 Vern. 132. 2 P. Wms. 134.

probably may be grounded on the Statute of *R.* 3. which made Recovery or Feoffment of *Ceſtuy que Uſe*, good againſt Feoffees.

A Man ſeiſed in Fee of Lands before the Statute of Uſes, to the Uſe of *J.* in Tail, the *Ceſtuy que Uſe* enfeoffs *C.* and *W.* who enfeoff others to the Uſe of *J.* during his Life, Remainder to his Son in Tail; the Son has Iſſue, and dies, and a Writ of Entry was brought againſt *J.* and a Recovery had: *J.* dies, the ſurviving Truſtees enter, and held that the Recovery binds the
*P. 106 * Feoffees only during the Life of *J.*
1 *And.* 44

Common Recoveries being Common Aſſurances, have a benign and large Conſtruction, and therefore every Thing as incident, appendant or appurtenant, paſſes by them as in other Common Conveyances, and the Acres in Common Recoveries are computed according to the Cuſtom of the Country, and not

ſtrictly

ſtrictly according to the Statute *de Terris menſurandis.* 6 *R.* 67.

If a Common Recovery be ſuffered of a Manor and 1500 Acres of Land, and the Manor comprehends 3000 Acres of Land, yet all the Land paſſes, for a Common Recovery is now a Common Aſſurance of Lands, and by *Præcipe* of a Manor, even in Adverſary Writs, all the Manor and Lands paſs, as has been ſhewed before in the Chapter of Tenant to the *Præcipe*; but the Danger is, becauſe there is a ſeparate and diſtinct Fine; for a Manor in the * Alienation Office, People often, to ſave that Charge, leave out the Manor: Now where the Manor is left out, there no more is barr'd by the Recovery than the Number of Acres contained in it; but even in this Caſe, the Judges will give as favourable a Conſtruction as may be, ſince now a Common Recovery is no more than a Common Conveyance uſed to convey an Eſtate Tail,

* P. 107

and not only a Manor, but a reputed Manor paſſes by a Recovery, tho' there be no Freeholders now: Yet if it was formerly a Manor, and ſtill retains the Name of a Manor, it will, as ſuch, paſs in a Fine or Recovery, and whatever is Part of it will paſs. 6 *R.* 66, 67. *Cro. Car.* 308. *Vide Cro. Eliz.* 52. *contra* 1 *Lev.* 28. 1 *Keb.* 592.

CAPUT.

*CAPUT V. *P. 108

Of the Difference between Common Recoveries with ſingle Voucher, and thoſe with double Voucher.

A Recovery may be had either without any Voucher, or with ſingle, double or treble Voucher; if there be a Recovery had without any Voucher, the Iſſue in Tail is not barr'd, for the Recompence in Value being the Reaſon of barring the Iſſue, a Recovery by Default, Confeſſion, or *Nient dedire*, binds not the Iſſue, for he has no Recompence, and is not eſtopped by his Father's Judgment; for he claims Paramount the Eſtoppel, *per formam Doni*; and therefore in this Caſe the Iſſue may falſify.

*P. 109 * If the Recovery be with ſingle Voucher, this is good to bar the Eſtate the Tenant was in Poſſeſſion of at the Time of the Recovery, but no other Eſtate; if with double Voucher, and the Tenant in Tail comes in as Vouchee, then it bars all the Eſtates he has in Poſſeſſion, and all others, though diſcontinued and turned to a Right; ſo that a Common Recovery, with a double Voucher, is in all Caſes moſt ſafe; and the true Reaſon of this Difference between a Common Recovery with ſingle and double Voucher is, that in a Common Recovery with ſingle Voucher brought againſt Tenant in Tail, who vouches over the Common Vouchee, if the Party be in of another Eſtate, the Iſſue after Tenant in Tail's Death, may plead *Nient Tenant tempore brevis nec unquam poſtea*, and ſo the Recovery void, for he is not eſtopped, for at the Time of the Writ, not being Tenant of the *P. 110 * Eſtate Tail, he can have no Recovery over of that Eſtate, for he was not ſeiſed

A Recovery with ſingle Voucher bars the Eſtate the Tenant was in Poſſeſſion of at the Time of the Recovery, but no other Eſtate: but if with double Voucher, and the Tenant in Tail comes *in* as Vouchee, it bars all the Eſtates he ever had.

ſed of it, and a Common Recovery does not prove the Tenant was ſeiſed of an Eſtate Tail, but ſuppoſes it, and at the Time of the Recovery, he being in of another Eſtate, the Iſſue has Right to the firſt Intail, notwithſtanding the Recovery; and if the Iſſue enters after the Death of Tenant in Tail, he is remitted; ſo if Tenant in Tail diſcontinue in Fee, and repurchaſes the Land, and grants a Rent and dies, the Iſſue ſhall hold it diſcharged; and though the Anceſtor has Judgment to recover in Value againſt the Common Vouchee, that binds not the Iſſue, for he cannot recover in Value of the firſt Intail, for that was diſcontinued, and a new Eſtate taken, and the Donor cannot warrant, by Reaſon of the firſt Intail, becauſe the Tenant is in of another Eſtate, and this Recovery in Value cannot go to the Eſtate Tail, becauſe the Tenant was *in of another Eſtate, and whether the Tenant in Tail ſhall recover in Value againſt the Donor or his Heirs, or a-

* P. 111

gainſt

gainſt an Eſtranger, by Reaſon of a Releaſe with Warranty, is all one; for the Land recovered in Value againſt the Donor, (who, by Suppoſition in Law, is always ſuppoſed to be vouched by the Donee, who ſuffers the Common Recovery) or Releaſor, muſt be an Eſtate Tail, as well in one Caſe as the other; but if he who recovers in Value was not in of the Eſtate Tail, then the Land recovered in Value cannot go in Lieu of the Eſtate Tail; for it is a Rule that an Eſtate Tail ſhall never be avoided by a Recovery in Value, if that which is recovered in Value comes not in Lieu of the Eſtate Tail, which it does not in this Caſe, and therefore it defeats not the Eſtate Tail, but that deſcends to the Iſſue; and by his Entry getting the Poſſeſſion, that accoupled with the Right, remits him; and *P. 112 * this being no more than a Recovery on a falſe Title, amounts only to a Diſcontinuance.

If one gives Lands to *J.* in Tail, and after *J.* recovers in Value againſt the Donor, of this Land recovered in Value the Iſſue ſhall have a Formedon, ſo is not prejudiced, becauſe the Land recovered in Value, is in Lieu of the Lands loſt by the Recovery; and that very Land ſhall be ſaid to be the Gift of the Donor, becauſe it comes in the Place and in Recompence for that which was given and evicted by the Recovery. But if *J. S.* gives Lands in Tail to *B.* and after *B.* recovers againſt *C.* by a Releaſe with Warranty, this Land recover'd ſhall not be ſaid to be the Gift of *J. S.* but of *C.* So in the Caſe of a Recovery with ſingle Voucher, where the Tenant is in of another Eſtate, the Land recovered in Value cannot be in Lieu of the Eſtate he was not ſeiſed of when he was Tenant to the *Præcipe*; ſo the Re-
* covery is no Bar to the Iſſue, who can never be barred but where there is a real or poſſible Recompence by Recovery in Value. And therefore, if there be

* P. 113.

a Woman Tenant for Life, Remainder to *A.* in Tail, Remainder over in Fee; Feme and *A.* intermarry, and ſhe and her Huſband levy a Fine *Sur Cognizance de Droit come ceo*, and the Lands are render'd to the Wife for Life, Remainder to the Huſband in Fee, and after they ſuffer a Common Recovery with ſingle Voucher, this is no Bar to the Intail, for the Huſband was not ſeiſed of the Intail at the Time of the Recovery, and the Fine was no Diſcontinuance, according to *Coke*, 1 *R.* 76. *a.* 6 *R.* 15. *a.* And by the Render a new Eſtate is given, ſo the Recompence extends to the new Eſtate, not to the old one. So if *A.* dies without Iſſue, Remainder-Man in Fee may enter. *Cro. El.* 828. *Moore Pl.* 870. So if Tenant in Tail diſcontinue, and take back an * Eſtate in Fee, and a *Præcipe* is brought againſt him, and he vouches the common Vouchee, this bars not the Eſtate Tail, but only the new taken Fee. But if Tenant in Tail diſcontinues, and

*P. 114

a *Præcipe* is brought againſt the Diſcontinuee, who vouches Tenant in Tail, who vouches over, this bars effectually the Eſtate Tail; for he who comes in as Vouchee in Judgment of Law, comes in Privity of all Eſtates he ever had before, though the precedent Eſtate on which the Voucher depends, is diveſted, diſcontinued and turned to a Right; for in this Caſe, where he comes in as Vouchee, he comes not only in of the Eſtate he has in Poſſeſſion, but of the diſcontinued Eſtate, and all other Eſtates, and the Recompence in Value, which he has or poſſibly may have, bars the Iſſue. 3 *R.* 60. *Moore* 634. *Owen* 130.

If a Writ of Entry be brought againſt Tenant in Tail, and he vouches *the Common Vouchee, and a Common Recovery is had, this is good, and bars the Eſtate Tail, if the Tenant be then in Poſſeſſion of it. So if Lands be given to *A.* in Tail, Remainder to the right Heirs of *B.* then living, and a Writ of Entry is brought againſt *A.*

* P. 115

and he vouches the Common Vouchee, this is a good Recovery and bars the Eſtate Tail and Remainder.

If Tenant in Tail be diſſeiſed, and ſuffers a Common Recovery, with ſingle Voucher, or if Tenant in Tail make a Feoffment of the Land, and take back an Eſtate to himſelf in Fee or in Tail, and ſuffers a Recovery with ſingle Voucher, the Intail is not barr'd, for the Reaſons herein before alledged, but by a Recovery, with a double Voucher; in all theſe Caſes it is barr'd: And therefore, if Tenant in Tail levies a Fine or makes any other Conveyance, and a *Præcipe* is brought againſt the Grantee, who vouches Te-
*P. 116 * nant in Tail, and he vouches over, this bars the Eſtate Tail. So if the Conuſee or Grantee makes a new Eſtate to the Tenant in Tail, or he diſſeiſes the Conuſee or Grantee, and then grants to another, and a *Præcipe* is brought againſt the Grantee, and he vouches the Tenant in Tail, and he

vouches the Common Vouchee, by this all the Estates are barr'd.

If Lands are given to *J. S.* and his Heirs Male of the Body of his Wife, and he have Issue a Son, and his Wife dies, he discontinues and takes back an Estate to him and his Heirs Female of his second Wife; and after discontinues again, and takes back an Estate Tail to him and the Heirs of his Body; and after discontinues again, and a Writ of Entry is brought against the last Discontinuee, and he vouches Tenant in Tail, and he vouches the Common Vouchee, this Common Recovery bars all the Estates Tail.

* If before the Statute of Uses, *A.* had be in Tenant in Tail, and had made a Feoffment in Fee to *B.* and *B.* had made a Feoffment to *C.* to the Use of *A.* and his Wife, and the Heirs of their two Bodies, and the Wife had died, and *A.* had enter'd on *C.* the Feoffee, and made a Feoffment in Fee, and a *Præ-* * P. 117

cipe had been brought againſt the Feoffee, who vouches *A.* and he the Common Vouchee, this bars all the Eſtates.

CAPUT VI.

† What is or is not barred by a Common Recovery.

See 2 Roll. Abr. Title *Recovery Common* 393, 394, 395, 396.

† What Eſtate or Intereſt may be barred or transferred by Fine or Recovery. 1 Eq. Ca. Abr. 255, 256.

What Charges and Incumbrances are made good thereby. Ibid. 257.

A Common Recovery duly ſuffered by ‡ Tenant in Tail, bars not only the Iſſue, but all Remainders and Reverſions, which would take Place after * the Determination of the Eſtate Tail, whether the ſame be in *Eſſe* or Contingent; and all former Eſtates, Leaſes and

‡ Tenant in Tail] Tenant in Tail by Purchaſe under a Marriage Settlement made by his Anceſtor *ex parte maternâ*, with the Reverſion in Fee by Deſcent *ex parte maternâ*, ſuffers a Recovery to the Uſe of himſelf in Fee, he gains a new Eſtate in Fee which ſhall deſcend to his Heirs General, and there is an End of the old Uſe. *Martin* v. *Strachan*, 2 Stran. 1179. 1 Wilſon 2. 66.

* P. 118

and Charges made by † him in Remainder or Reverſion. And the Reaſon why Remainders and the Charges made by them that have them are barr'd, is collected from *Capell*'s Caſe; for at Common Law the Remainder was only a Poſſibility of a Reverter till the Statute *de Donis*; and on that Statute the Judges, by Conſtruction, turned this Poſſibility into fixed Eſtate, called a Remainder or Reverſion. Now as a Recovery was a Conveyance excepted out of that Statute, and an inherent Privilege annexed to the Eſtate, as by it the Tenant in Tail could have barr'd the Remainder; ſo he may all Charges made by the Remainder-Man. And as the Grantor of that Charge had been bound by a Common Recovery, ſo had thoſe that claim under him; for the Recoveror in a Common Recovery is in * of an Eſtate he has gained under Tenant in Tail in Poſſeſſion, which Eſtate is no Ways ſubject to the Charge of him in

† But if Tenant in Tail himſelf had granted a *Rent*, and afterwards ſuffered a Recovery, the *Rent* which was *in Eſſe* ſhall not be gone by this Recovery. Cro. Eliz. 792, 793.

* P. 119

in Remainder or Reverſion, and the Charge of him in Remainder can be only good in Reſpect of the Poſſibility that the Land may come in Poſſeſſion, which Poſſibility being deſtroyed by the Common Recovery, the Remainder is gone, 1 *R.* 61. *Capell's* Caſe, 4 *Leon.* 150. *Poph.* 5. *Moore* 154. But the more ſolid Reaſon ſeems to be, that by the Recovery the Eſtate Tail is extended, and the Recoveror is *in* of an Eſtate, that by Suppoſition of Law, continues for ever; ſo that the Eſtate having a perpetual Continuance, no Charge of him in Reverſion can ever take Place. See this explained by Lord Chief Juſtice *Hale*, in † *Benſon* and *Hodſon's* Caſe, 2 *Lev.*

† Father and Son on the Son's Marriage, by Leaſe and Releaſe convey Lands to Truſtees and their Heirs to the Uſe of the Father for Life, Remainder to his Wife for Life, Remainder to the Son for 99 Years if he ſhould ſo long live, Remainder to Truſtees during his Life to ſupport Contingent Remainders, Remainder to the Son's intended Wife for Life, for her Jointure, Remainder to the firſt and every other Son of that Marriage in Tail Male, Remainder to the Daughter or Daughters of that Marriage, and the Heirs of their Bodies, 'till they ſhall, out of the Rents, Iſſues and Profits, have received 3000 *l.* Remainder to the Heirs of the Body of the Son, Remainder to the ſecond Son of the Father, and to his firſt and other Sons, Remainder to the right Heirs of the Son for ever. The Marriage takes Effect, and they have Iſſue only two Daughters, who being in Poſſeſſion after all the other Eſtates determined, which were precedent, ſuffer a Recovery to the Uſe of themſelves and their Heirs; and one Queſtion in this Caſe was, Whether by this

2 *Lev.* 28. and the Caſe on Lord *Derwentwater*'s Recovery was accordingly determined, under the Act 4 *Geo.* 1. by the Judges delegated to hear Claims on the this Recovery the Remainders were not barred. And it was argued that they were, becauſe the primary Intention of this Limitation was to make them Tenants in Tail; and the raiſing of the 3000 *l.* was but a ſecondary Intention thereof, and when they being ſo Tenants in Tail ſuffer a Recovery, this bars their Eſtate Tail, and the Remainders depending thereon; for this was cited and relied on as a Caſe in Point, *Benſon* v. *Hudſon*, 1 Mod. 108. to 112. 2 Lev. 28. S. C. and the ſeveral Caſes there put by *Hale* C. J. But the Lord Chancellor was clear of Opinion, both upon the firſt ſpeaking to it, and the next Day after, that this was but in the Nature of a Security for the 3000 *l.* and tho' the Recovery barred the Eſtate Tail and Remainders at Law, yet the Daughters were but in the Nature of Truſtees (after the 3000 *l.* raiſed) for thoſe in Remainder, that before the Recovery they had but an Eſtate Tail for their Security for that Sum, that now, after the Recovery, they had the Fee Simple; but ſtill the ſame in a Court of Equity was but a Security, till that Money raiſed; that thoſe in the Remainder had the Equity of Redemption in the ſame Manner as the Perſon who made that Security would have had, if no ſuch Limitation in Remainder had been; that therefore they might at any Time by paying off that 3000 *l.* determine the Eſtate of the Daughters, and then the Daughters would be but Truſtees for them; that this 3000 *l.* being to be raiſed out of the Rents, Iſſues and Profits, if the ordinary or annual Rents and Profits of the Lands would not raiſe the Money in a convenient Time to anſwer the Intent of the Settlement which was to provide for Daughters; that in a Court of Equity the ſame might be decreed to be raiſed by a Sale or Mortgage thereof, which were the extraordinary Profits of the ſame Lands; and though in this Caſe the Daughters had been in Poſſeſſion of thoſe Lands for ſome Time, and received the Rents and Profits thereof, yet they might ſtill ſupply any deficiency in the raiſing of theſe Portions by Mortgage or Sale, and the Rents and Profits already received ſhould be applied in the firſt Place towards the Intereſt of the 3000 *l.* and the Reſidue received towards the Principal, and what ſhould fall ſhort ſhould be made up by a Sale or Mortgage; otherwiſe if they ſhould be confined to raiſe the 3000 *l.* out of the annual Rents and Profits only, they would be eating out their Portions, and might never have any Sum adequate to the Proviſion intended them. *Stanhope* v. *Thacker*, Preced. in Chanc. 435. Trin. 1716.

*P. 120 * the forfeited Eſtates, in which Caſe it was reſolved, that he took no new Eſtate by the Recovery, by Way of Purchaſe, but was in of his old Eſtate, which by the Operation of the Recovery, was extended into a Fee-ſimple, and diſcharged of the Statute *de Donis*, *Weſtm.* 2. and the Limitations and Reſtraints introduced by that Statute; which Reaſon ſuits with common Experience; for if Tenant in Tail make a Leaſe not warranted by the Statute, or enter into a Judgment or Recognizance, and then ſuffer a Common Recovery, the Leaſe and other Incumbrances are all good, which were before defeaſible by the Iſſue; for the Recoveror comes in ſubject to all the Incumbrances of Tenant in Tail, and the Recovery opens, as we call it, and lets in all the Incumbrances; and therefore, when a Man has to do with Tenant in Tail that is incumber'd with Judgments, &c. it is very dangerous, though he *P. 121 * ſuffer a Common Recovery; for all the prece-

A Recovery ſuffered by Tenant in Tail lets in all his Incumbrances which were before defeaſable by the Iſſue.

precedent Judgments take place of the Security he gives.

Tenant in Tail incumber'd with Statutes and Judgments, makes a Mortgage of Part of his Eſtate for 500 Years, and after, to corroborate this Term, levies a Fine *Sur conceſſit* for 500 Years, with Proclamations to the Mortgagee; and the Queſtion was, Whether this Fine ſhould enure to the particular Advantage of the Mortgagee, or let in prior Incumbrances. Sir *Edward Northey* was of Opinion, the Fine let in all prior Incumbrances. Serjeant *Lutwych*, after great Conſideration, was of a contrary Opinion; but it ſeems Sir *Edward Northey*'s Opinion is the better; for let us take the Caſe without the Fine, and then ſee what Operation the Fine has. It is plain, that during the Life of Tenant in Tail, any prior Incumbrance was preferable to the Mortgage for 500 Years, and the *Mortgagee could never avoid the prior Incumbrance; then what does the Fine

Tenant in Tail incumbered with Judgments, *&c.* makes a Mortgage for 500 Years, and to corroborate this Term levies a Fine *ſur Conceſſit* for 500 Years with Proclamations to the Mortgagee. *Quære* the Operation of this Conveyance?

* P. 122

do? That bars the Iſſue and gives the Conuſee a Title as long as Tenant in Tail has Iſſue of his Body, though the Eſtate, which before was good only for Tenant in Tail's Life, and avoidable by his Iſſue, now bars the Iſſue, and is inlarged and made more extenſive. And what Reaſon can there be that the Eſtate thus inlarged, ſhould not have Continuance for other Incumbrances, as well as the Mortgage? I really can ſee none: Suppoſe this had been a Fine *Sur Conuſance de Droit come ceo*, with Proclamations of the whole Eſtate, none will ſay but this lets in the Incumbrances, as long as Tenant in Tail had Iſſue of his Body, and they ſhould be preferred according to their Priority; what Difference is there then, between a Fine *Sur Conuſance de Droit come ceo*, and a Fine *Sur Conceſſit*, with Proclamations? Truly none, as to the barring *P. 123 * the Iſſue, only one is a Bar during the Term granted (by the Fine *Sur Conceſſit*), and the other is a Bar as long as there

is

is Iſſue; ſo that it ſeems the Incumbrances will take Place before the Mortgage; but the Caſe being never reſolv'd, as I know of, deſerves Conſideration: But if in this Caſe Tenant in Tail had ſuffered a Recovery of Part, and declared the Uſe to the Mortgagee for 500 Years, no Doubt, all prior Judgments had been let in.

A Common Recovery does not only bar the Iſſue, Remainders, Reverſions, and all Charges made by Remainder-Men, but eſtops all Parties; and therefore, if Tenant in Dower, or a Jointreſs, join in a Common Recovery, they are barr'd; and if there be no Tenant to the *Præcipe*, yet if the Party who ſuffers the Common Recovery have a Fee-ſimple, he and his Heirs are eſtopped. So if a Man ſeiſed in Fee, be diſſeiſed, the Diſſeiſee, during the Diſ-
*ſeiſin, ſuffers a Common Recovery, *P. 124
though this be void for want of a Tenant to the *Præcipe*, yet the Diſſeiſee, and all claiming under him, are eſtop-

ped. *Cro. Car.* 388. So if there be Tenant for Life, Remainder to Baron and Feme, and their Heirs, and they ſuffer a Common Recovery, or come in as Vouchees, this binds them and their Heirs, *Stiles* 319. And generally all are bound by a Common Recovery that cannot falſify, 2 *Cro.* 592. And tho' a Common Recovery bars the Iſſue, and all Remainders and Reverſions, and all Things dependant, incident or derived out of the Remainder, yet it bars not Things collateral to the Eſtate Tail. 2 *Cro.* 592. 2 *Roll's Rep.* 221.

Tenant for Life, Remainder in Tail, he in Remainder lets for Years, to begin after the Death of Tenant for Life, and after Tenant for Life ſuffers a Recovery, wherein Tenant in Tail is vouched, Tenant for Life dies, and the
*P. 125 * Leaſe held good, for the Leſſee may falſify. *Cro. Eliz.* 718.

If Tenant in Tail grant a Rent in Fee, or make a Leaſe, and ſuffer a Recovery, and die, the Recoveror can avoid

avoid neither of them, for he is eſtopped to ſay Recoveree had not a Fee-ſimple. *Poph.* 5.

A Common Recovery bars alſo contingent Remainders; and therefore if a Man is ſeiſed in Fee, and deviſes to his eldeſt Son *Thomas*, for Life, and if he died without Iſſue living at the Time of his Death, to *Leonard*, another of his Sons, and his Heirs; but if *Thomas* had Iſſue living at his Derth, then the Fee to remain to the right Heirs of *Thomas*. Deviſor dies, *Thomas* enters and ſuffers a Common Recovery, and dies without Iſſue, and held *Leonard* barr'd; for *Thomas*, by the Will, had an Eſtate for Life, Remainder to his Heirs, not executed; and though the Reverſion deſcended to him, as Heir, * this merges not the Eſtate for Life, contrary to the expreſs Will, but leaves an Opening for the Interpoſition of the Meſne Remainders, when they happen; ſo the Eſtate here to *Thomas*, being for Life, and the Eſtate to *Leonard* contingent,

A Recovery bars contingent Remainders, becauſe it deſtroys the particular Eſtates upon which the contingent Remainders depend.

* P. 126

gent, the Recovery bars it. *Sid.* 47. *Raym.* 28. 1 *Keb.* 29, 119. *Jones* 77. 1 *Lev.* 11. The Reaſon is becauſe the Recovery deſtroys the particular Eſtate, which is the Prop of the contingent Remainder; and wherever a contingent Remainder is limited to depend on an Eſtate of Freehold, which is capable to ſupport a contingent Remainder, it is always conſtrued to be a Remainder, and not an executory Deviſe. And where the Remainder is contingent, if the particular Eſtate, whereon it depends, be deſtroyed, the Remainder is gone; ſo a Deviſe to *A.* for Life, Remainder to his next Heir Male: *A.* ſuffers a Common Recovery, the Remainder is gone and deſtroyed, 1 *R.* 66. *P. 127 **Archer*'s Caſe, *Cro. El.* 453. So if it be to the right Heirs of a Stranger living, for the Eſtate is certain, though the Perſon is uncertain. *Sid.* 47.

Though a Common Recovery bars a contingent Remainder, yet it bars not an executory Deviſe, nor a ſpringing

Uſe. It muſt be owned, that People have been very ingenious in perplexing the Law; for theſe Terms are barbarous and unknown to the Common Law, and therefore it will be fit to ſee what an Executory Deviſe is.

What an Executory Deviſe is.

An Executory Deviſe is where an Eſtate deviſed by a Teſtator, is future, and to ariſe on a Contingency; and is properly where ſuch an Eſtate is made by Will, which cannot, by the ſtrict Rules of the Common Law, take Effect; but the Party's Intention appearing plainly, the Judges, by Conſtruction, make it good. There are two Sorts of Executory Deviſes; one where the whole Fee-ſimple paſſes; and that * is properly an Executory Deviſe: The other a Kind of Future Deviſe, where the Fee does not paſs, but in the Interim deſcends to the Heirs.

* P. 128

The Difference between an Executory Deviſe and a contingent Remainder.

Theſe Executory Deviſes are permitted *propter rei neceſſitatem*; and every Executory Deviſe of a Freehold, muſt be of a Fee, and on Condition; but when

when a particular Eſtate is limited, and the Inheritance paſſes out of the Grantor, then it is a † Contingent Remainder; but if the Fee veſts in any Perſon, and is to veſt in another, on a Contingency, then it is an Executory Deviſe, which needs no Eſtate to ſupport it, becauſe the Eſtate deſcends to the Heir at Law, till the Contingency happens.

† Deviſe, that if *William* my Son ſhall happen to die and leave no Iſſue of his body lawfully begotten that then in that Caſe and not otherwiſe, after the Death of the ſaid *William* my Son, I give and bequeath all my Lands of Inheritance in *L.* unto *Richard* my Son and to his Heirs; held that *William* took an Eſtate Tail by Implication, who ſuffered a Recovery which barr'd the Eſtate limited to *Richard*, which was held to be a Contingent Remainder, and not an Executory Deviſe. Comyns 373, 374.

A Man deviſes to one and his Heirs, and if he dies without Heirs, then it ſhall remain over to *B.* this is a void Deviſe; for a Fee cannot mount on a Fee. But if a Man deviſes to *A* and his Heirs, and if he die without Iſſue, living *J. S.* then to *J. S.* and his Heirs, * this is a good Executory Deviſe, not a Remainder, and a Recovery by *A.* does not bar it, 2 *Cro.* 591. So if Lands are given to *B.* and his Heirs, as long as *C.* has

*P. 129

has Heirs of his Body, and *B.* ſuffers a Common Recovery, this bars not the Donor of his Poſſibility, for he had not a Remainder or Reverſion, but an Intereſt and Poſſibility, which cannot receive a Recompence in Value. So if Lands are deviſed to *A.* and his Heirs, as long as *B.* has Heirs of his Body, Remainder over, and *A.* ſuffers a Common Recovery, this does not bar the Remainder, for it is an Executory Deviſe, and it is not ſeen in Law till it appears, and has no Dependance on the firſt Eſtate. *Sid.* 202. 1 *Mod.* 111.

A Man by his Laſt Will deviſes to *J. B.* for ninety-nine Years, if he ſo long lives, Remainder to the firſt and other Sons of *J. B.* in Tail Male, Remainder to *J. W.* for ninety-nine Years, if he live ſo long, Remainder to his * firſt and other Sons in Tail Male, Remainder to the Heirs Male of the Body of *Elizabeth Long*, Remainder to his right Heirs. And Sir *Edward Northey* was of Opinion that the Remainder to the

* P. 130

firſt Son of *J. B.* was an Executory Deviſe, but it ſeems this cannot be conſtrued an Executory Deviſe, becauſe all Executory Deviſes are raiſed by Conſtruction of Law, which makes the ſecond Deviſe precede the firſt, to ſupport the Teſtator's Intentions (as in *Manning*'s Caſe). Now in this Caſe there can be no ſuch Conſtruction: And if the Remainder to the firſt Son of *J. B.* be conſtrued an Executory Deviſe, then all the ſubſequent Remainders muſt be conſtrued Executory Deviſes, or be void. If they are conſtrued Executory Deviſes, that tends directly to a Perpetuity; if they are conſtrued void, then the Will of the Teſtator is not performed; for he intended the ſubſequent Remainders limited to the ſecond and other Sons of *J. B.* and the firſt and other Sons of *J. W.* and the Heirs Male of *Elizabeth Long*, ſhould take as well as the firſt Son of *J. B.* But this Intention being contrary to Law, the Remainder to the firſt

*P. 131

firſt Son of *J. B.* and all the ſubſequent Remainders are void. And of this Opinion were the Judges, but the Judgment was reverſed *in Domo Procerum*, and the Son of *Elizabeth Long*, though his Mother was living, had the Eſtate. *Beamont* ver. *Long*, in a Writ of Error *a Cam' Scaccarii.* Trin. Term 1713.

A. and his Wife ſeiſed of a Copyhold Eſtate *Jure Uxoris*, he and his Wife ſurrender to the Uſe of Huſband and Wife, and the Heirs of the Huſband; the Huſband ſurrenders to the Uſe of his Will, and after deviſes to the Heirs of the Body of the Wife, if he or they live to attain the Age of Fourteen Years; and for want of ſuch Heirs, then to the Uſe of *C.* and his * Heirs: Deviſor died, the Wife married *D.* by whom ſhe had Iſſue *E.* the Huſband ſuffers a Common Recovery, this bars not, for this is an Executory Deviſe to the Heirs of the Body of the Wife. *Raym.* 162. It is ſaid 2 *Cro.* 592. If he to whom Executory Deviſe is * P. 132

made come in as Vouchee, his Heir is barr'd. *Sed Quære.*

If the Remainder be in Abeyance, a Common Recovery bars; as Tenant in Tail, Remainder to the right Heirs of *J. S.* Tenant in Tail ſuffers a Common Recovery, this contingent Remainder is barr'd. 6 *R.* 42. *Raym.* 28. *Sid.* 47. 1 *Keb.* 29. 2 *Keb.* 147. 3 *Keb.* 389.

A Man (ſeiſed in Fee) by Leaſe and Releaſe, ſettles his Eſtate to the Uſe of himſelf for Life, Remainder to *M.* his Daughter, for ninety-nine Years, if ſhe lives ſo long, Remainder to Truſtees, and their Heirs, to preſerve contingent Remainders; and after the Determination of the ſaid Term, or the Death of
*P. 133 * *M.* then to the Uſe of the Heirs of the Body of the ſaid *M.* lawfully to be begotten; and for Default of ſuch Iſſue, then to the Uſe of *A.* for ninety-nine Years, if ſhe live ſo long, Remainder to the ſaid Truſtees, and their Heirs, during the Life of the ſaid *A.* but in Truſt for the Heirs of the Body of the ſaid

ſaid *A.* lawfully to be begotten; and after the Determination of that Eſtate, and the death of the ſaid *A.* then to the only Uſe of the Heirs of the Body of the ſaid *A.* like Remainders to *B.* and *C.* and *D.* with like Limitations to the Heirs of their Bodies, Reverſion to a Stranger in Fee. Grantor dies, *M.* enters, and has a Son that attains to Twenty-one Years of Age; the Mother and Son cannot in this Caſe, ſuffer a Common Recovery, and thereby bar the Remainders; for the Remainder to the Heirs of the Body of *M.* being ſupported by the Freehold limited to the Truſtees, was a contingent Remainder, * and no Intail executed; † and ſo no Recovery can be where there is no Intail.

* P. 134

† *Knowling* had Iſſue two Sons *John* and *Richard*,

It and deviſed Lands to *John* for 50 Years if he ſhould ſo long live, and after the Determination thereof, then to the Heirs Males of the Body of the ſaid *John*, and for default of ſuch Iſſue, then to his ſecond Son *Richard* in Tail, &c. Remainder to the right Heirs of the Deviſor: The Father died, *John* ſuffered a Recovery and declared the Uſes to himſelf for Life, and to the Heirs Males of his Body, and for want of ſuch Iſſue to the Defendant and his Heirs. *John* died without Iſſue, and *Richard* died leaving Iſſue a Son *Richard*. The queſtion was, Whether *John* had an Eſtate Tail by this Deviſe? If he had, the Recovery is good and ſhall bar the Remainders.

The court reſolved that he had not an Eſtate Tail by *Implication* becauſe the Deviſor had given him an Eſtate for Years by expreſs words. Secondly, That the

It is true a Common Recovery would bar the contingent Remainder, if the Truſtees, who were in Truſt for the Heirs of her Body, joined; but that would prejudice *M.* and her Son; for on her Death, he that has the next Remainder veſted, would have the Eſtate; ſo the barring the contingent Eſtates, would be no Advantage, but a Diſadvantage to *M.* and her Sons, and all the contingent Remainders.

the Deviſe to the Heirs Males of the Body of *John* was a *contingent Remainder* and void, becauſe there is nothing but a Term of Years to ſupport it, and as *that* Limitation was void, the next Remainder limited to *Richard* took Effect preſently. *Goodright* v. *Corniſh*, 4 Mod. 255. 1 Salk. 226. S. C. Skin. 408. S. C. Judgment for the Plaintiff againſt the Recovery. See 1 Salk. 224. 3 Lev. 431.

A Common Recovery bars not a contingent Executory Eſtate. So if one have an Eſtate in Fee, determinable on a Limitation or Condition; as if Lands are given to *A.* and to his Heirs, until *B.* pays him 100 *l.* and then to remain to *B.* and his Heirs: *A.* ſuffers a Common Recovery, this bars not *B.* but on Payment of the Money he ſhall have the Land. *Palm.* 132. *Brid.* 3. So if a Writ of Entry be brought againſt the

* Mortgagee, and he ſuffers a Common Recovery, this bars not the Mortgagor; but if the Mortgagee vouch the Mortgagor, it is good, but it is no bar, unleſs he be vouched. 2 *Roll. Rep.* 222. 2 *Cro.* 592. 1 *Keb.* 30. * P. 135

If one has an Eſtate for Life, with Power to make a Jointure, and ſuffer a Common Recovery, his Power is extinguiſhed; for the Eſtate to which the Power was annexed, is gone and forfeited by the Recovery. *Aliter* of a collateral Power to make Eſtates; as where Executors had Power to ſell. *Vent.* 225, 226. 1 *Mod.* 111. 1 *Keb.* 31. 3 *Keb.* 291.

Leaſe for Life to *A.* Remainder to *B.* in Tail, Remainder to *C.* in Tail, Remainder to the right Heirs of *A.* Proviſo that *A.* ſhall have Power to make Leaſes in Poſſeſſion, Reverſion, or Contingency, to commence after Death of *B.* without Iſſue. *A.* makes a Leaſe for Years, to commence after the * Death of *B.* without Iſſue, *B.* ſuffers Common * P. 136

Common Recovery, this bars the Leaſe, *Raym.* 236. So if an Eſtate be limited to one for Life, Remainder to his firſt and tenth Sons in Tail Male, and for want of ſuch Iſſue, to Truſtees for 500 Years. If any Tenant in Tail in Poſſeſſion, ſuffer a Common Recovery, the Remainder for 500 Years is barr'd. *Sid.* 102. 1 *Keb.* 462. 3 *Keb.* 488.

One made a Gift in Tail, determinable on the Donee's Non-payment of 100 *l.* Remainder to *B.* in Tail: Tenant in Tail, before the Day of Payment, ſuffers a Common Recovery, and after pays not the Money; yet becauſe he was Tenant in Tail, when he ſuffered the Recovery, all is bar'd. 1 *Mod.* 111. 1 *Keb.* 31. 3 *Keb.* 291.

A Term ſubſequent to the Eſtate Tail, as to riſe after Failure of Iſſue Male, is barrable, as has been ſaid before, by Common Recovery; but if a Man make a Leaſe for 100 Years to
P. 137 *B.* to commence after the Leſſor's Death, without Iſſue Male inn Truſt for

for Payment of Daughters Portions, and after, by another Deed, limits the Lands to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail, a Common Recovery bars not the Term for 100 Years; for the firſt Term was precedent, and the Eſtate created by different Deeds, but by the ſame Deed *Alit'*. And the Caſe of *Goodier* and *Clarke*, 1 *Lev.* 35. was a Settlement in Conſideration of Marriage, and 1000 *l.* to the Uſe of the Huſband for Life, Remainder to his firſt, ſecond and tenth Son in Tail Male, and if he died without Iſſue Male, Remainder to the Uſe of his Daughters, for a Term of Years to raiſe 1500 *l.* Remainder over. The Huſband has a Son and Daughter, and dies, the Son died without Iſſue, ſo the Land remained over, according to the Settlement; and there held, the Son might have barr'd * this Term by a Common Recovery; but it is plain the Caſe was not rightly ſtated; for it ſeems this Term created for

* P. 138

1 Keb. 73, 78, 169, 246. Sid. 102. 1 Vent. 229.

Daughters Portions, was in another precedent Deed made before the Settlement, and then could not be barred. 1 *Keb.* 462. And ſo held by the Lord Chief Juſtice *Holt*, *Andrews* ver. *Stroud*, *T.* 5 *Annæ*, *B. R.* So the Difference is, when the Term is precedent to the Intail, and when ſubſequent; ſo is *Hudſon*'s and *Benſon*'s Caſe, 2 *Lev.* 26. but better reported 1 *Mod.* 108.

But *Quære* if ſuch Leaſe be good to commence after Failure of Iſſue.

A. covenants to levy a Fine to the Uſe of himſelf and the Heirs Male of his Body, Remainder in Tail to ſeveral others, Remainder to his own right Heirs, provided always, and if it ſhall happen that there be a Failure of Iſſue Male of his Body, and *Anne* his Daughter be married, or of the Age of Twenty-one Years, then ſhe to have 200 *l.* a Year for ten Years. Tenant in Tail dies leaving Iſſue Male, who * enters and makes a Leaſe for a thouſand Years and levies a Fine, and ſuffers a Common Recovery, and dies without Iſſue; *Anne* was Twenty-one

*P. 139

Years

Years old, and held the Rent of 200 *l.* *per Annum* well barr'd by the Common Recovery, becauſe the Remainder out of which it iſſued, is barred. 3 *Keb.* 274, 287, 292. *Raym.* 236. 1 *Mod.* 108. 2 *Lev.* 28. *Cro. El.* 769.

If a Gift in Tail is made, rendring Rent, and Tenant in Tail ſuffers a Recovery, this bars not the Rent, but it remains as a collateral Charge on the Land, diſtrainable of Common Right; but if there had been a Condition of Re-entry for Nonpayment, the Condition had been gone. *Cro. El.* 727, 768, 769. *Jenk. Cent.* 413. 3 *Leon.* 261. 2 *And.* 170. 2 *Lev.* 30.

If the Iſſue in Tail comes in by Title Paramount, the Recovery of his Anceſtor bars him not. 1 *R.* 96. *a.*

* If Baron be ſeiſed in Tail *Jure Uxoris*, Remainder in Tail to *B.* Remainder to *C.* Baron bargains and ſells the Land, and a *Præcipe* is brought againſt the Bargainee; this bars all the * P. 140

Remainders, but not the Feme. 2 *Rol. Abr.* 394.

If *A.* be Tenant in Tail, Remainder to *B.* in Tail, Remainder to *C.* in Tail, *A.* makes a Feoffment, Feoffee ſuffers a Common Recovery, and vouches *B.* his Intail and all ſubſequent Remainders and Reverſions are barred, but not the firſt Intail to *A.* 3 *R.* 6.

If an Eſtate be limited to a Man and the Heirs Male of his Body, as long as ſuch a Tree ſtands, a Common Recovery bars this Eſtate. 1 *Mod.* 111. 3 *Keb.* 392. If Tenant in Tail levy a Fine with Proclamations, and after the Proclamations ſuffer a Common Recovery; though by the Fine with Proclamations the Eſtate was well barred, yet this bars the Remainder, tho' *P. 141 * there was no Eſtate Tail at the Time of the Recovery. 2 *Rol. Abr.* 394. *Cro. El.* 388.

Feoffment to the Uſe of himſelf for Life, Remainder to his firſt Son in Tail Male, and before a Son is born Tenant

for Life ſuffers a Common Recovery, and after a Son is born, he cannot avoid it, becauſe Remainder not *in Eſſe*; and for that Reaſon it ſhould not bar, becauſe Remainder not being *in Eſſe*, the Recompence cannot extend to it. 2 *Leon.* 224. *Moor* 201. But the true Reaſon is, becauſe the Remainder was † contingent, and the Eſtate on which it depended gone; and a Fine or Feoffment in this Caſe, would have deſtroyed the Remainder, as well as a Common Recovery; ſo if Remainder be in Abeyance. 6 *R.* 42. *a.*

† One ſeiſed of the Manors of *A.* and *B.* deviſes theſe Manors to *C.* for Life, and if *C.* ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever, and if *C.* ſhould leave no Iſſue Male, then the Manor of *A.* to *J. S.* in Fee, and the Manor of *B.* to *J. N.* in Fee, *C.* ſuffers a Recovery of thoſe Manors; this will bar the contingent Eſtates limited to *J. S.* and *J. N.* 1 P. Wms. 509.

A. covenants on his Marriage to lay out 3000 l. in the purchaſe of Land, and to ſettle it on *A.* in Tail, Remainder to *B.* *A.* purchaſes the Manor of *D.* with this 3000 l. and never ſettles it, but ſuffers a Recovery thereof; as the Covenant was a Lien on the Land; ſo the Recovery ſuffered of it, diſcharges the Lien, and bars *B.* of the Benefit of the Covenant and of the Remainder. 3 P. Wms. 171.

An Eſtate was ſettled by *A.* to the Uſe of himſelf for ninety-nine Years, if he live ſo long, Remainder to *B.* for ninety-nine Years, if he live ſo long, Remain-

*P. 142 * Remainder to Truſtees to preſerve contingent Remainders, Remainder to the firſt and other Sons of *B.* Remainder to the right Heirs of *B.* *B.* has no Iſſue, he and his Truſtees join in a Feoffment, this bars the Remainder to the right Heirs of *B.* and his firſt Son, if any born after; for theſe Remainders were contingent; but if the Remainder had been to the right Heirs of *A.* it had been his Antient Reverſion. *Pigot* and *Pigot*, in *Canc. Mich.* 12 *An.*

Upon a Settlement, *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife *Jane*; and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to theſe Limitations; *A.* does ſuffer a Recovery and deviſes the Lands; the Covenant is good to bind the Aſſets; but *A.* being Tenant in Tail, and as ſuch, having Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected. 1 *P. Wms.* 104. 2 *Vern.* 635. *Collins* v. *Plummer.*

CAPUT.

CAPUT VII.

Of Vouching and Recovery in Value.

WHEN the Tenant to the *Præcipe* has a Writ of Entry brought againſt him, in order to ſuffer a Common Recovery, he appears either * in Perſon or by Attorney, and takes upon him the Defence of the Land, and vouches to Warranty, that is, alledges he had the Land of another, who in the Conveyance thereof bound himſelf to warrant, and make good the Title; ſo prays that Party may be called in to defend the Title; and this, in Law, is called a Voucher, which, as my Lord *Coke* deſcribes it, is when the Tenant calls in another into Court to defend the Land, or otherwiſe to have other Land

* P. 143

Land of him of the Value of the Lands loſt, by Reaſon of his Warranty; and he who vouches is called the Voucher, and he who is vouched the Vouchee; and if the Vouchee be in Court, he immediately enters into Warranty; but if he be not in Court, then goes out a *Sum' ad Warr'*, and then the Entry is *vocat' inde ad Warr'* A. B. *Sum' in Com' prædicto & habeat eum hic a die, &c. per Auxilium Cur'*; *idem dies dat' eſt partibus præd' hic, &c.* And though in the Caſe *P. 144 * of Common Recoveries, the vouching and every Thing elſe ſeems to be Matter of Form, yet the ſhewing the Nature of Voucher in Adverſary Writs, will illuſtrate this Matter.

At Common Law all were to appear in Perſon before Juſtices in *Eyre*; and therefore if the Vouchee were not there the firſt Day, he was amerced. See Stat. of *Marlbridge* 27 *Weſtm.* 1. *cap.* 39. and 10 *Ed.* 1. *de Vocatis ad Warr'*, 14 *Ed.* 2. *c.* 18. and what Alterations they have made in the Common Law.

In

In all Poſſeſſory Actions, if the Tenant vouches to Warranty, and the Demandant counterpleads the Voucher, and will aver the Tenant or his Anceſtors, whoſe Heir he is, was the firſt that entred, he ſhall be received in all Writs of Entry that make mention of the Degrees, none ſhall vouch out of the Lien; but if a Diſſeiſor makes a Leaſe for Life, Remainder in Fee, Diſſeiſee brings a Writ of Entry in the * *Per*, againſt Leſſee for Life, who makes Default, and he in Remainder is receiv'd, he may vouch out of the Degrees, and a Voucher is properly on a Feoffment with Warranty; but on a Releaſe with Warranty, the Party is put to his *Warrantia Chartæ*. *M.* 12 *H.* 7. 3. * P. 145

Præcipe quod reddat againſt *A.* who vouches *B.* who enters into Warranty, and after the Demandant releaſes all his Right to *A.* *A.* cannot plead this, for the Continuance in Court is between the Demandant and Vouchee;

but the Vouchee may plead it, or a Releaſe to himſelf. *T.* 5 *H.* 7. 39, 40. *Jenk. Cent.* 100.

In ſome Caſes a Man may vouch himſelf as Formedon againſt Huſband and Wife, they vouch the Huſband, and ſhew for Cauſe, that the Father of the Huſband enfeoffed certain Perſons, who gave the Land to Huſband and Wife in Tail, and vouch the Huſband to ſave the Intail. *M.* 11 *H.* 7. 7. And
P. 146 * in all Caſes where a Man vouches himſelf, he muſt ſhew Cauſe. *M.* 12 *H.* 7. 3.

Præcipe quod reddat againſt one who vouches himſelf to ſave an Intail, and the Voucher accepted, and a *Sum' ad Warr'* iſſues, and Summons returned, Vouchee makes Default, Tenant appears, Grand Cape awarded, for it is in the Degree of another Perſon, tho' vouches himſelf. *P.* 42 *E.* 3. 16. And in ſome Caſes the Vouchee may vouch the Demandant himſelf; as Aſſize of *Mortauncester*, by *Iſabel* in *London*, who vouches

ches a Foreigner, and the Record ſent into the Common Pleas, and Proceſs againſt the Vouchee, who enters ſingly into Warranty, and pleads that one *Alice* was ſeiſed in Fee, who took the Vouchee to Huſband, and had Iſſue *Iſabel* the Demandant, and *Alice* is dead, and the Vouchee Tenant by the Curteſy, and prays in aid of him. 41 *E.* 3. 7.

* The Tenant vouches *J. Pinſar*, and on the *Sum' ad Warr'*, *J. Pinſar*, Chaplain, appears and demands the Lien, Tenant pleads it is not the ſame Perſon, the Demandant prays Seiſin of the Land, and the Counter-plea held ill, for after Voucher granted, the Demandant ſhall not have Counter-plea; and it is not Reaſon that by a Stranger's appearing the Tenant ſhould loſe his Warranty, and a *Capias ad Valentiam* awarded againſt the true *J. Pinſar Paſchæ.* 45 *Edw.* 3. 6. * P. 147

Præcipe quod reddat, Tenant vouches two Heirs, and pleads one is under Age,

and prays the Parol may demur; the Demandant replies, at full Age, and prays an Inſpection and Proceſs till the *Sequatur ſub ſuo periculo*, and at the Return does not appear; the Demandant prays Seiſin of a Moiety, and a *Sum' ad Warr'* for the other Moiety. *T.* 45 *E.* 3. 23. If two are vouched, and one makes Default, a *Capias ad Valen'*
*P. 148 * iſſues of all againſt him that made Default.

And the Method uſed for Recovery of Land on Voucher in Adverſary Writs, is to be obſerved, ſince it conduces much to the Underſtanding the true Reaſons Common Recoveries are grounded on. If the Vouchee be not in Court, then a *Sum' ad Warr'* goes out, and if the Sheriff return the Vouchee ſummoned, and he make Default, then a *Capias ad Valentiam* goes out for the Tenant; but if on the *Sum'* the Sheriff retorn *Nil*, an *Alias*, and after a *Pluries* go out, and then a *Sequatur ſub ſuo Periculo* iſſues; and if Vouchee makes Default,

Judgment

Judgment ſhall be given for the Demandant to recover the Land, but no Judgment for the Tenant to recover in Value, becauſe it appears Vouchee had not Aſſets. 1 *Inſt.* 101. So if a Summons be returned, and a Default made, and a *Capias ad Valentiam* iſſue, and a *Nil* is returned, an *Alias* and *Plus Pluries* * iſſues, with a *Sequatur ſub ſuo Periculo* on the *Pluries*. If on the Return of the *Ca' ad Valentiam* the Vouchee makes Default again, Judgment ſhall be given for the Demandant againſt the Tenant, and for the Tenant againſt the Vouchee; and in ſhort, the Proceſs to call in the Vouchee is a *Sum' ad Warr'*, if the Sheriff returns a Summons, and Vouchee makes Default, then a *Magnum Cape ad Val'* goes out, and if on it he makes Default, Judgment is given againſt him, and that he ſhall have in Value againſt the Vouchee; but if Vouchee appears and makes Default, then a *Parvum Cape ad Val'* goes out, and on another Default, Judgment as before; but if

* P. 149

the Sheriff returns *Nil*, then an *Alias & Pluries & Sequatur ſub ſuo Periculo*, and the Tenant has no Recovery over, as has been ſaid before; if there be a Default of the Vouchee at the Return of the *Sequatur ſub ſuo Periculo*, then the Tenant muſt be called, and if he make
*P. 150 * Default, a *Petit Cape* is awarded, and no Judgment till the Return. *Kel.* 41. If the Sheriff return not the Writ through the Tenant's Default, Demandant may pray Seiſin of the Land. On every *Sum' ad Warr'*, in Adverſary Writs, there muſt be nine returns between the *Teſte* and *Ret'*; but the Practice is otherwiſe in Common Recoveries, by the Stat. 16 *Car.* 2. *c.* 6. *vide poſt.*

At Common Law, as appears by the ſaid Statute, were nine Returns, the Words are theſe, " And whereas be-
" fore the making this Act, all Writs
" of *Sum' ad Warr'* againſt Vouchees
" upon Common Recoveries had in
" Writs of Entry and Writs of Right
" of Advowſon, had nine Returns, in-
" cluſive;

" cluſive; now for the more ſpeedy
" perfecting ſuch Recoveries, be it en-
" acted, That all and every ſuch Writs
" of *Sum' ad Warr'* upon the Appear-
" ance of the Tenant to every ſuch
" Writ of Entry or Writ of Right of
*" Advowſon, ſhall and may be made *P. 151
" and abridged to five Returns, as Writs
" of *Sum' ad Warr'* in Writs of Dower,
" *unde nil habet.*"

The Returns are not abridged in this Caſe in *Ireland*, but they are never obſerved; for where the Voucher appears by Attorney, they make them appear *gratis*, inſtantly, without any Day given; and though this is aſſignable for Error, yet upon ſearch, the Precedents appearing all uniform in this Point, it may be ſaid *Communis Error facit Jus*; and therefore it has not been thought adviſable to bring a Writ of Error on this Defect.

If two enter into Warranty, and one dies, the Lien does not ſurvive, but his Heir ſhall be ſummoned with the Survivor. *T.* 17 *E.* 3. 41.

Tho'

Tho' in Common Recoveries, which are always by Aſſent of Parties, the Vouchee never demands the Lien, yet he may, and then his Warranty extends *P. 152* no farther than the Lien, as appears by *Plowd. Manxwell's* Caſe. 2 *Brownl.* 171. But if without demanding the Lien, one enters generally into Warranty, there ſhall be an Execution of all Warranties, and it binds all Rights.

If Tenant in Tail vouches in an Adverſary Action, and recovers in Value, and has Execution, and after the Recovery is falſified by him, and he has the Land again, yet he ſhall retain the Land recovered in Value for fear of future Loſs, becauſe his Warranty is determined; for when he has had Judgment and Execution, he has had the Effect of his Warranty, and can vouch no more on that Warranty. 10 *R. Mary Portington's* Caſe. *Hob.* 27.

CAPUT

*CAPUT VIII. *P. 153

Of Execution, and the Eſtate the Recoveror has by the Recovery.

AFTER the Demandant has Judgment in a Common Recovery againſt the Tenant, and the Tenant againſt the Vouchee, and the Vouchee againſt the Common Vouchee, the Court awards an *Habere fac' Seiſinam* to the Sheriff of the County where the Lands lie, which is returned, and ſo the Recovery compleat and executed. And though this is not much regarded, being only Matter of Form, yet in many Caſes it is not ſafe to proceed 'till there is a Return of the *Habere fac' Seiſinam*; for whenever a Recovery is to Uſes, as all Common Recoveries are, no Seiſin is in the Recoveror, no Uſe raiſed,

*P. 154 *'till the † Execution of the Recovery; for 'till then the Land paſſed not. *Moore* 281. *T.* 7 *H.* 4. 17. So that till then no Uſe ariſing, the Party to whoſe Uſe the Common Recovery is declared to be can convey nothing, for *Nemo dat quod non habet.*

† In Ejectment, the Defendant claimed under a Recovery, whereby it was inſiſted the Leſſor of the Plaintiff was barred; the Recovery and Judgment thereon was found by ſpecial Verdict, but no Writ of Seiſin or Execution thereof was found; ſo the Court of B. R. was of Opinion, that Defendant could have no Advantage of the Recovery. Then Defendant moved for a *Ve. Fa. de novo*, it being a Recovery an hundred Years old, on which Execution would be preſumed; and in Fact there was a Writ of Seiſin and Return, and this Recovery is compleatly found in a Cauſe depending on the Demiſe of the Duke of Athol: It was likewiſe inſiſted, that the Minutes find this Recovery *prout*, &c. and therefore warrant the inſerting this; but the Court refuſed to grant a *Ve. Fa. de novo*. *Lewis* on the Demiſe of the *Earl of Derby* v. *Witham*. 2 Stran. 1185. 1 Wilſon 48, 49, &c.

If Tenant in Tail ſuffer a Common Recovery, and dies before Execution, Execution may be ſued againſt his Iſſue, *Plowd.* 55, 375. 1 *R.* 6. If Lands be conveyed to *A.* and his Heirs, with Warranty, and the Grantee ſuffer a Common Recovery to the Uſe of him and his Heirs, it is but the old Eſtate in Degree and Privity as before. So if Lands be conveyed to *A.* in Fee, with Warranty to him, his Heirs and Aſſigns, and

and *A.* ſuffers a Common Recovery to the Uſe of a Stranger, the Recoveror may vouch as Aſſignee *Hob.* 27. And whenever a Common Recovery is ſuffered by a Man to his own Uſe, he is in the Eſtate as he was before.

* Tenant in Tail mortgages his Lands, and after ſuffers a Common Recovery to make a Jointure, this Recovery extends the Eſtate Tail, and lets in the precedent Mortgage in Prejudice of the Jointure; becauſe the Recoveror comes in in Continuance of the Eſtate Tail, and ſubject to all Incumbrances of Tenant in Tail; and in this Caſe the Court of Chancery will not relieve. 1 *Chan Rep.* 120. * P. 155

Recoverors in Common Recoveries, their Heirs and Aſſigns, by the Statute 7 *H.* 8. *c.* 4. have like Remedy againſt Leſſees for Lives and Years, by Diſtreſs, Avowry, and Action of Debt for Rents and Services that ſhall be due after Recovery, as the Party had before; and alſo like Actions of Waſte, and on Di-

ſturbances in Preſentations, as the Leſſor had.

If a Man make a Leaſe for Years to begin at *Michaelmas*, reſerving Rent, *P. 156* and before *Michaelmas* ſuffers a Common Recovery; the Recoveror ſhall, in this Caſe, diſtrain for the Rent which Leſſor before the Recovery could not. 1 *Inſt.* 104.

CAPUT IX.

Of falſifying Common Recoveries.

A Common Recovery may be defeated, fruſtrated and reverſed, whichi s called Falſifying, many Ways, as by Entry and Plea, by Action, by Action and Plea, by Plea only. By Entry and Plea, when the Party's Entry is not taken away by the Recovery, and he

he brings his Assize, and the Recovery is pleaded against him, and he pleads Matter to avoid the Recovery: But to clear these Points, let us see who may falsify in an Adversary Recovery. If * one be ousted by Covin, between the Demandant and him that ousts, the Tenant and Demandant brings an Assize against the Party that ousted the Tenant, the Tenant may have an Assize; and on the Special Matter shewed shall avoid this Recovery. * P. 157

By Action and Plea, that is, when the Entry of the Party that has Right, is taken away by the Recovery, and on a real Action brought, the Recovery is pleaded in Bar of the Right, this may be falsify'd by Plea, and so by Action only, or by Plea only.

The Causes for falsifying Recoveries, are Covin, an elder Right or Title, Want of Jurisdiction in the Court, Warranty and Assets, a Release, Feint pleading, no Tenant to the Freehold, or Want

of Eſtate in the Tenant; to make out which, ſee the following Authorities.

Sci' fac' on a Judgment in a *Ceſſavit*, againſt a Parſon, who prays in Aid of the Patron and Ordinary, who makes
*P. 158 * Default, and on the Default, Judgment given; and now to the *Sci' fac'*, the Parſon pleads *Non Ceſſavit*; and by *Martin* and *Paſton*, he ſhall not falſify this Recovery againſt his Predeceſſor, but is put to his *Juris Utrum*. 10 *H.* 6. 5, 6.

Sci' fac' againſt an Abbot, on a Judgment in an Annuity had againſt his Predeceſſor, the Abbot pleads that his Predeceſſor confeſs'd the Judgment, when he had a Releaſe of the Annuity; and *per Cur'*, He ſhall not thus avoid the Recovery; for his Predeceſſor had the Fee-ſimple, and not like a Parſon who is *Quodammodo* Tenant for Life, who ſhall avoid it, where it is without Aid pray'd of Patron and Ordinary. 30 *H.* 6. 45, 46.

Annuity

Annuity againſt a Parſon who prays in Aid of Patron and Ordinary, who makes Deſault, and the Parſon tries the Title, and loſes; this binds the Succeſſor, and he ſhall not falſify the Recovery in the Point tried, though all the * Jury be dead, ſo that he cannot have Attaint. 34 *H.* 6. 2. *b.* 10. * P. 159

Aſſize; Tenant pleads in Bar a Recovery in Dower; Plaintiff replies, that the Lands demanded are in the *Cinque Ports*, *Ubi breve Domini Regis non currit*, and held the Plea ill; for Judgment at *Weſtminſter*, for Lands in the *Cinque Ports*, good; *Aliter* of Lands in *Wales*. 36 *H.* 6. *b.* 32, 33.

Writ of Forcible Entry, the Plaintiff makes Title by a Recovery in a Writ of Right againſt the Leſſor of the Defendant; the Defendant pleads, that at the Time of the Writ of Right brought, his Leſſor had aliened the Reverſion to *A.* to whom he attorn'd, and held good. 1 *H.* 7. *Pl.* 7.

A Par-

A Parson made a Lease for Years, and afterwards in a *Quare Impedit* brought against him and the Patron, they pleaded faintly, Lessee shall not falsify, because if the Parson had resigned, the Lease had been gone. *T.* 26 *H.* 8. *Pl.* 3.

*P. 160 * Entry in the *Post*, the Tenant vouches, and the Vouchee makes Default, and Lessee for Years of the Tenements, prays to be received on the Statute of *Glouc'*, because Vouchee is now Tenant; and by the Statute of *H.* 8. if he is not received, he may now be admitted to falsify. 27 *H.* 8. *Pl.* 20.

Note, Where it is said in the old Books, that Privies cannot falsify in the Point tried, that must be understood in a *Sci' fac'*, on the same Judgment, or in another Action of the same Nature; but in an Action of a higher Nature, the Parties may try the same Thing again; and there is a Difference where the Parties have not the absolute Fee in them, as Parsons, Prebendaries, &c. there the Successor is not bound; but in Actions of

of the ſame Nature, may falſify, or have *Juris Utrum*; but where, by the Common Law, they have the mere Right as Biſhops, *&c.* there they cannot falſify. 6 *R.* 8. *a.*

* Father Tenant in Tail enfeoffs his Son, and diſſeiſes him, and levies a Fine, the Son enters before Proclamations paſt, and enfeoffs *A.* who makes a Leaſe for Years to *B.* the Iſſue in Tail, on a Formedon, recovers on a feint Defence. *B.* brought an Ejectment, and held that he might falſify the Recovery in the Formedon. 2 *Cro.* 589, 610. *Moore Pl.* 503. *Owen* 15. Diſſeiſor makes a Feoffment in Fee, the Feoffee leaſes for Years, Diſſeiſee recovers againſt Diſſeiſor in an Aſſize; on a *Nul tiel tort* pleaded, Leſſee ſhall be admitted to falſify in the Point try'd, and to plead that the Diſſeiſor *Ne diſſeiſe pas*, for he is a Stranger, and at Common Law every Stranger may falſify, becauſe he cannot have Error or Attaint; and where he has * P. 161

Wrong, by natural Equity he ought to have Redreſs. 3 *Cro.* 284.

In Dower a Termor prayed to be received for his Term made by Leaſe before the Coverture; and held by the
*P. 162 * Court, that in this Caſe the Judgment ſhall be general; but the Writ ſhall command the Sheriff to go to the Land, and to deliver Seiſin to the Feme, but not to ouſt the Tenant; ſo that thereby Demandant has Reverſion and the Rent. 3 *Cro.* 563, 564.

Tenant for Life, Remainder in Tail, the Remainder-Man makes a Leaſe for Years, to commence after the Death of Tenant for Life; a Common Recovery is ſuffered by Tenant for Life, who vouches him in the Remainder, the Leſſee for Years may falſify. 3 *Cro.* 718.

Where it is ſaid in the Books, one ſhall not falſify where he is Party, it hath three Exceptions; firſt, if the Party can ſhew that the Recovery was void in Law; ſecondly, if the Recovery was of Lands in *D.* and they lie in *C.* thirdly, if the

Recovery was on a Writ that is abated. 2 *Cro.* 466.

Tenant in Tail acknowledges a Statute and dies, a *Sci' fac'* is brought a-
*gainſt the Iſſue, and the Sheriff returns * P. 163
him Tenant of the Land, and he appears to the Writ, and pleads *Riens per Diſcent*, and Verdict againſt him, and before Judgment leaſes to *B.* he cannot in this Caſe falſify; for here, by this Judgment, the Iſſue is bound and chargeable with the Statute; and he being bound, his Leſſee that claims under him is bound alſo. The Caſe is well argued, 3 *Bulſt.* 345. where are many good Caſes put about falſifying Recoveries. *Rol. Rep.* 424.

As to Tenant in Tail, it is held in all the Books, that the Iſſue in Tail ſhall never falſify in the Point tried; and therefore if a Recovery be againſt Tenant in Tail, and a *Nient Dedire* pleaded, the Iſſue has no Remedy, but by Attaint; but if the Verdict be on a collateral Matter, and not on the Title, or by De-

fault, he may falſify. *Brooke*, Title *Fauxifier Recovery*, *Pl.* 4.

*P. 164 * A Man recovers Lands, and brings a *Sci' fac'* againſt *M. N.* and after brings a *Sci' fac'* againſt *J.* Tertenant, who pleads *M. N.* was not Tenant at the Time of the firſt *Sci' fac'* brought, *nec unquam poſtea*, but one *B.* whoſe Eſtate the Tenant now has; ſo the Recovery void, and held a good avoidance of the Recovery; and yet *Non Tenure* generally is no Plea. *Brooke*, *Fauxifier Recovery*, *Pl.* 32.

2 Ld. Raym. 785. By the Stat. 21 *H.* 8. *c.* 15. Tenants for Years, by Stat. *Merch. Staple* or *Elegit*, may falſify feigned Recoveries ſuffered by them in Reverſion; and tho' none can falſify in the Point tried, yet in ſome Caſes where the Party cannot have Attaint, he may; but none can in any Caſe falſify, without making Title, nor can he falſify who claims under him that ſuffered the Recovery.

Theſe are the Rules laid down for falſifying Recoveries in Adverſary Writs,

and Common Recoveries may alſo in * many Caſes be avoided. As if there be no Tenant to the *Præcipe*, or if the Writ is brought againſt a Stranger that had nothing, and he vouches Tenant in Tail in Poſſeſſion, or becauſe he that hath the Eſtate and Right, is not Party or Privy to the Recovery. As when a Writ of Entry is brought againſt the Diſſeiſor, and he vouches a Stranger, or if another have a Term or Intereſt at the Time of the Common Recovery, there they may falſify to ſave their Intereſts; or if it be by Covin by Tenant for Life to diſinherit the Reverſioner; or if there be an Error of Subſtance in the Recovery, a Writ of Error lies. * P. 165

And where a Common Recovery is avoidable, it muſt be avoided by him that is barred by the Recovery, as by the Iſſue of Tenant in Tail, or if none, by the Remainder-Man, or Reverſioner by Writ of Error; and if Tenant for Life ſuffer a Recovery, he in Reverſion may falſify during the Life of Tenant for

P. 166 for Life, or after his Death. And whenever a Common Recovery is falſified, it is by Writ of Error, by pleading, and in ſome ſpecial Caſes, by Motion of Court.

If an Infant reverſe a Common Recovery for Nonage, he muſt do it under Age. 1 *Mod.* 49. *Sid.* 321. 1 *Lev.* 142.

See Stat. of *Glouc. c.* 11. that Leſſees in *London* may falſify. 21 *H.* 8. *c.* 15. 2 *Inſt.* 322, 323, 324.

CAPUT

*CAPUT X. *P. 167

Of † Errors in Common Recoveries, and in what Caſes Common Recoveries and Fines may be amended.

See 1 Eq. Caſ. Abr. 258, 259. in what Caſes Equity will ſupply Defects, or vacate Fines and Recoveries.

† On a Writ of Error to reverſe a Recovery, there muſt be a *Scire Facias* againſt the Tertenants. *Hall & Ux'* v. *Woodcock*, 1 Burro. 361. Trin. 31 & 32 Geo. 2.

What the Tertenant muſt, and what he may not plead. Ibid. S. C. 361, 362.

A Remainder Man's Right to reverſe one erroneouſly ſuffered, and his Method of doing it. See 1 Burro. 412, 413.

In Error to reverſe a Recovery, there muſt be a *Scire Facias* againſt the Tertenants and the Heir. 3 Mod. 274. 4 Mod. 209.

COmmon Recoveries being judicial Executions of the Agreement of Parties, the Law gives them all favourable Conſtruction imaginable: And the Judges even extend their Power to ſerve the Parties Intentions; and the Courts at *Weſtminſter* are ever ready to ſupport them, where-ever they can, but yet ſo as to keep up the Form of judicial Proceedings, and not totally to introduce Barbariſm, and encourage Ignorance.

And

† Support] They ought not to be ſupported where the Parties have no Power to ſuffer them. Bur. 116 to 119. A ſecret Feoffment under a naked Poſſeſſion, is not ſufficient to enable one to ſuffer a Recovery; nor is an Eſtate by Wrong, Fraud, or Practice ſufficient. 1 Burro. 117, 118.

And for the † Support of Common Recoveries, being Common Aſſurances of Land, the Stat. 23 *El. c.* 3. enacts, That no Common Recovery ſhall be reverſed for * falſe or incongruous *Latin*, Raſure, Interlining, Miſentry, Omiſſion of the Return of the Sheriff, or any other Want of Form.

* P. 168

‡ Twenty Years] *Lloyd* v. *Vaughan*, 2 Stran. 1257. Upon Error to reverſe a Recovery ſuffered at the Grand Seſſions in *Wales*, 5 Annæ, the Error aſſigned was, that *Jane Lloyd*, the Tenant in Tail, who was vouched as a *Feme Sole*, was then under Coverture and died without Iſſue in 1739. wherefore the Plaintiff who was the Reverſioner, brings the Writ of Error; the Defendant in Error pleads a Bar by the Stat. 10 *W.* 3. *c.* 14. as not being a Writ of Error brought within 20 Years after ſuffering the Recovery. To this it was replied, that his Title did not accrue 'till 1739, the Time of the Death of *Jane*; and to this there was a Demurrer and Joinder in Demurrer.

After ſeveral arguments both upon the Point of Error and the Stat. of Limitations, the Court determined only upon the latter Point, that the Writ of Error did not lie. They were of Opinion, that the Stat. was made to quiet Poſſeſſions, and to fix a certain Period, beyond which Fines and Recoveries ſhould not be impeached; the Words are expreſs "*Twenty Years after the Recovery ſuffered*", and it has not the Words that are in the Stat. of Fines, "*After the Title accrued.*" And tho' there is a *Proviſo* for Perſons under Diſabilities within

By the Stat. 10 *W.* 3. *c.* 14. No Fine or Common Recovery, or any other Judgment, unleſs Error brought in ‡ twenty Years; if Perſons *infra*, &c. then

then within five Years after the Impediment removed.

within the twenty Years, yet *that* can only introduce the diſabled Perſon, and not one who was never under any Diſability. The *Terminus a quo* is the ſuffering the Recovery, and if we exceed it, there will be no end; a Reverſioner after an Eſtate Tail that ſubſiſts 100 Years, might at this Rate reverſe a Recovery; whereas theſe Reverſioners were never the Object of the Legiſlature's Care. It is enough that he has a Chance of the Reverſion's falling within twenty Years, and then he may have Error. They ſaid they muſt keep to the Words as in 1 Lev. 31. where the Courts not being open, was held no Anſwer to the Stat. of Limitations, as not being one of the Exceptions in it. Therefore they gave Judgment, that the Plaintiff ſhould take nothing by his Writ of Error. Trin. 19 & 20 Geo. 2.

A Writ of Error was brought to reverſe a Common Recovery had at the Grand Seſſions in *Wales*; and the Error aſſigned was, that the Summons is dated after the *Ded. poteſtat.* and ſo no Warrant of Attorney at the Time of Appearance, but held good. *Sid.* 219. And in this Caſe the Court, to ſupport the Common Recovery, will intend there was another Warrant of Attorney. *Raym.* 11, 34, 90. 1 *Keb.* 34. 1 *Lev.* 130. *Dyer* 220. *contra*, 1 *Leon.* 86. and in *Raym.* 71. held that the *Ded. poteſtat.* is no Part of a Fine, though * a Warrant of Attorney is of a Reco- * P. 169

very; but if the Party be dead, then it is ill. 2 *Vent.* 96. 20 *H.* 7. 9.

Writ of Entry *Ret' die Lunæ quart' Septiman' Quadrageſim' prox' futur'*, ſhall be referred to the fourth Week next, not the next *Lent*. *Cro. El.* 389.

If the Vouchee die † before Judgment, or be ‡ under Age, and appeared in

† In a Common Recovery entred of Eaſter Term in the 23d Year of K. Geo. 2. among the Pleas of Land upon the 173d and 174th Rolls, wherein *Thomas Broome* was Demandant, *George Green* Tenant, and *Edward Swann*, Gent. and *Edward Swann* the younger, were Vouchees jointly, who vouched over the Common Vouchee, the Writ of Summons was returnable *in one Month* from the Day of Eaſter, which was *Sunday* the 13th of May 1750; on which Day *Edward Swann* the younger, one of the Vouchees, (Remainder Man in Tail Male and Son of *Edward Swann*, Gent. the other Vouchee who was Tenant for Life of the Manor of *Lee* in Derbyſhire) died without Iſſue Male, leaving *Mary* an Infant his Heir at Law, and Heir to the Common Anceſtor who claimed under the Recovery.

Samuel Swann claiming as Heir in Tail, and a Cauſe being depending in the Court of Chancery, where the validity of this Recovery became a Queſtion, as *Edward Swann* the younger died upon the return Day of the Writ of Summons to Warranty being a *Sunday*.

The Chancellor upon the hearing retained the Bill for a Twelvemonth, and left *Samuel Swann* at Liberty to bring a Writ of Error to try the validity of the Recovery, who brought a Writ of Error in B. R. accordingly, againſt the Demandant *Broome*, and (among other Things) aſſigned for Error, that the ſaid Writ of Summons was returnable on *Sunday* the 13th of May 1750, on which Day the ſaid *Edward Swann* the younger died, without Iſſue Male of his Body, at *Bradburne*, in the County of *Derby*; and ſo concluded in the common Form, that the Judgment in the Recovery was erroneous, and prayed the ſame might be reverſed. *Broome* (the Demandant) the Defendant in Error, joined in Error, and in *Mich. Term* 1764, the Recovery was reverſed by the Judgment of the Court of B. R. which Judgment of Reverſal was affirmed in the Houſe of Lords, *May* 2, 1766, and with the Opinion of all the Judges, that the Judgment in the Recovery could not be given until *Monday* the 14th of *May* 1750, which

in Perſon, or by Attorney, it is Error. 1 *Rol.* 301. *Dyer* 90. *Palm.* 224. 5 *Mod.* 209.

which was after the Death of the ſaid Vouchee *Swann* the younger, and the Recovery was erroneous. See alſo the Caſe of *Wynne* v. *Wynne*, 1 Wilſon 35, 42. A Recovery was reverſed for Error, becauſe the Vouchee died on the 10th of *May*, and the Writ of Summons was returnable the 16th of the ſame Month. The Error aſſigned was, that the Vouchee died before the giving Judgment in the Recovery, upon which an Iſſue to the Country was joined and a ſpecial Verdict was found, and whether the Vouchee died before Judgment or not, the Jury left to the Conſideration of the Court.

The Error aſſigned was, that the Vouchee was a *Feme Covert* and under Age and appeared by Attorney, the Recovery was reverſed. 5 Mod. 209.

A Writ of Error was brought to reverſe a Recovery, and a *Scire Facias* iſſued againſt all the Tertenants, and they made Default. The Recovery was reverſed: And it appearing afterwards that the Plaintiff in the Writ of Error, had no Title, there being a Remainder Man before him, the Court reverſed their former Reverſal. 5 Mod. 396. See 1 Roll. Abr. 755. Title *Error*. (R)

‡ 1 Roll. Abr. 755. (R) pl. 6. 2 Ro. Rep. 85.

An erroneous Common Recovery is good till reverſed, by Reaſon of the intended Recompence; and if Tenant in Tail ſuffer an erroneous Recovery, and after diſſeiſe the Recoveror, and dies, his Iſſue ſhall not be remitted; for the Recovery ſhall be preſumed good, till it is reverſed. 3 *R.* 3. 10 *R.* 38.

If he who ſuffers a Common Recovery levy a Fine, or make a Feoffment, he cannot have a Writ of Error to reverſe it.

*P. 170 * And Common Recoveries being only Common Assurances, the Court of Common Pleas does amend and supply the Defects of Clerks and Attornies in the entring up such Recoveries, or in Writs relating to the same. So a Common Recovery was agreed to be suffered, wherein *John Chapham* and *Richard Elton*, were to be Demandants, and by Mistake of the Clerk, the Writ of Entry was sued out in the Name of *John Chapham* and *John Elton*, and the Recovery suffered in the Name of *John Elton*, instead of *Richard*, and this Recovery amended, *T.* 2 *Car.* 1. *Chapham* v. *Bacon*. The Rule for this Amendment is to be found in the Remembrance of Rules in *Foley*'s Office, that Term, on the third Skin, and first side of the same Skin.

A Warrant of Attorney was given in order to suffer a Common Recovery, by *William Reynolds*, and *Hester* his Wife; but the Serjeant that took the Warrant of Attorney, certifies the same

*P. 171 * to be given by the said *William Reynolds*, and

and *Margaret* his Wife, and the Mittimus and Tranſcript were made of a Warrant given by *Margaret*, and the Recovery entred accordingly, and all ordered to be amended. *Mich.* 4 *Car.* 1. the ſame Office, fifth Skin, on the Back of the ſame.

A Common Recovery agreed to be ſuffered by *Arthur Golding & Ux.* of Lands in *Alphamton, & Magna Hermny, in Com' Eſſex*, but by Miſtake, the ſame was ſuffered of Lands in *Alphamton* and *Lamarſh*, and ordered to be amended in the Writs of Entry, Seiſin and Entry of the Recovery, *M.* 6 *Car.* 1. *Skinner* ver. *Laud*, the ſame Office, ſecond Skin, the Back of the Skin.

A Common Recovery ſuffered by *R. Callow & Ux.* but the Name of the Wife totally omitted; and this ordered to be amended, *M.* 8 *Car.* 1. *Thurban* verſus *Pantry*; ſame Office, third Skin, on the Back of the ſame.

* A Common Recovery was agreed to be ſuffered of Lands in *New Church*, *Leving-* * P. 172

Levington and *Merſham*, but *New Church* was totally omitted in the Recovery; and this upon reading the Indenture, ordered to be amended, *T.* 13 *Car.* 1. *Whetwell* verſus *Maſters*; ſame Office, ſecond Skin, firſt Side.

A Common Recovery was agreed to be ſuffered of two Meſſuages and one Garden in *London*, and ſuffered only of one Meſſuage, and ordered to be amended, *T.* 13 *Car.* 1. *Brooke* ver. *Biddolph*, ſame Office, firſt Skin, firſt Side.

A Writ of Entry for a Common Recovery was ſued out returnable in *Craſtin' Animarum*, and a Recovery ſuffered thereon, but the Writ of Seiſin made returnable the ſame Return as the Writ of Entry, and this ordered to be amended, *P.* 16 *Car.* 1. *Doncaſter* v. *Campion*, the ſame Office, third Skin, ſecond Side.

*P. 173 * A Deed to make the Tenant to the *Præcipe*, was executed, dated 1 *Nov.* 33 *Car.* 2. and Common Recovery ſuffered thereon, and the Writ of Entry made *Ret' tres Mich'*, before the date of the Deed,

Deed, and this ordered to be amended, and the Writ of Entry made, *Ret. Craſtin' Animarum, M. 4 W. & M. Bunce et al'* verſus *Greenway et al' :* This Rule is in the Remembrance of Mr. *Borrett*'s Office.

A Deed was made to make a Tenant to the *Præcipe*, dated the 11 *Nov.* and a Common Recovery ſuffered, and the Writ of Entry made returnable *menſe Mich'*, before the Date of the Deed, and this ordered to be amended *Mich.* 5 *W. & M. Wattry* verſus *Jodrell.*

A Common Recovery had been ſuffered, and the Writ of Entry made *Ret'* before the Date of the Deed, that led the Uſes of it, and which made the Tenant to the *Præcipe*, and on reading the Deed, ordered to be amended. *M.* 5 *W. & M. Warkhouſe* verſus *Watts :* * This Rule may be found in the Remembrance of Mr. *Cooke*'s Office. * P. 174

A Fine and Common Recovery were agreed to be levied and ſuffered of the Manor of *Inkfield, in Com' Salop*, and by Miſtake, the ſame was made *Ingle-*

field, and both ordered to be amended, *viz.* the Fine in the Record of the King's Silver, in the Foot and Note of the Fine, and in all the Places of the ſaid Fine and the Recovery, in the Writ of Covenant, Writ of Entry, Exemplification, & *habere fac' Seiſinam*, 9 *W.* 3. *Int' J. Foſtre, Ar' & Ux.* And the Rule may be found in the Remembrance of Mr. *Cooke*'s Office.

A Fine and Common Recovery agreed to be levied and ſuffered of Lands in *Cranley, in Com' Surry*, and by Miſtake, the ſame was written *Crawley*; and on Examination of the Proceedings therein, and peruſal of the Deeds to make a Tenant to the *Præcipe*, and declaring the Uſes of the ſaid Fine and * Recovery, the ſame were ordered to be amended in the ſeveral Parts of the Fine and Recovery, and in the Writs of Covenant, Entry and Seiſin, *T.* 4 *Jac.* 2. *Int'* William Freeman, *Gen' Quer'* & William Montague, *Jun', Ar' & Ux' Deforc':* This alſo may

*P. 175

may be found in the Remembrance of Mr. *Cooke*'s Office.

A Common Recovery was agreed to be ſuffered of Lands in *Weſton, in Com' Glouc'*, and by Miſtake, written *Waſton*, and ordered to be amended in the Record, and other Places of the ſaid Recovery, and in the Writs of Entry, Seiſin, *&c. M.* 11 *W.* 3. *Int'* Simon Smith, *Ar' Peten' & Ric'um Comit' Dorſet & al' Tenen'*; which Rule may be found in the Remembrance of Mr. *Cooke*'s Office.

If Tenant be preſent and vouch to Warranty *A.* and one appears for him, it is Error, and the Appearance void; for he ought to appear in Perſon, or elſe *a *Sum' ad Warr'*; and where ſummons is entred on the Roll, there, at the Return, the Vouchee may appear in Perſon, or by Attorney. 1 *Leon.* 86. *P. 176

2 Salk. 570. S. C.

Page verſus *Hayward.*

Trin. 3 Annæ, B. R.

A Deviſe to *M. B.* and the Heirs Male of her Body, upon Condition and provided that ſhe intermarry with, and have Iſſue Male by one Surnamed *Searl*, is a good Eſtate Tail.

Nicholas Searl deviſed to his Niece *Mary Bryant*, and the Heirs Male of her Body, upon Condition, and provided that ſhe intermarry with, and have Iſſue Male by one Surnamed *Searl*; and in Default of both the ſaid Conditions, he deviſed to *Elizabeth Bryant*, [in the ſame Manner] and in Defect thereof, he deviſed to *George Searl* for ſixty Years, if he ſo long live, Remainder to the Heirs Male of the Body of the ſaid *George*, and their Iſſue Male * for ever: *Mary*, and *Elizabeth* with her Huſband, for ſhe had then married one *Clift*, joined in a Fine to make a Tenant to the *Præcipe*, who was one *Iſaac Savery*; *Iſaac Savery* vouched *Mary Bryant*, *Elizabeth Clift* and her Huſband, and the

* P. 177

Wife of the Deviſor with her Huſband, ſhe being again married, and vouched them all jointly, and they vouched over the Common Vouchee. *Et per Holt*, Ch. Juſt. & *tot' Cur'*, adjudged, that firſt, the Eſtate deviſed to *Mary*, was a good Eſtate Tail, and ſo was the Eſtate to *Elizabeth*; but it is a Special Entail, it is an Eſtate to her and the Heirs Male of her Body begotten by a *Searl*, which is a middle Entail, not the higheſt nor the loweſt; for it might have been to her and the Heirs of her Body begotten by *J. Searl*, which had been more particular, yet this is a good Eſtate Tail within the Statute *de Donis*; for it is within the Reaſon of that Statute. *Co. Lit.* 26. *b.*

* Secondly, The Words upon *Condition*, &c. though expreſs Words of Condition ſhall be taken to be a Limitation: So it is held 1 *Vent.* 199, 202. and *Holt* ſaid he ſaw no Reaſon why they might not be ſo conſtrued in a Deed, though the Law had not been carried

* P. 178

ſo far; and ſo the Senſe is, if ſhe has no Iſſue by a *Searl*, upon her Death without ſuch Iſſue, the Eſtate ſhall remain over.

Thirdly, That the Eſtate Tail of *Mary* and *Elizabeth*, or either of them, does not ceaſe by marrying one that is not a *Searl*; for the Remainder over is in Default of both Conditions; and in the mean time it is ſo limited to her and the Heirs Male of her Body; and ſhe may ſurvive the firſt Huſband, and after marry a *Searl*; and ſo there is a Poſſibility as long as ſhe lives.

A Condition that runs with the Land cannot be barred by a Recovery.

Fourthly, If the Eſtate had been to *Mary*, and the Heirs Male of her Body by a *Searl* to be begotten, provided and upon Condition ſhe do marry any but a *Searl*, that then it ſhall remain and be to *J. S.* and his Heirs. A Common Recovery ſuffered before Marriage will bar the Eſtate Tail and Remainders; and tho' ſhe after marry with another, it ſhall not avoid the Recovery. And the Court took a Difference between a Collateral

* P. 179

Recovery, *aliter* of a Condition Collateral.

Condition

Condition and a Condition that runs with the Land. If the Donor reserves a Rent, with Condition to re-enter, a Recovery will not bar it; *aliter*, if it be to re-enter for Nonpayment of a Sum in Gross. *Vide* 1 *Mod.* 108, 111. 2 *Lev.* 28.

And as to Common Recoveries being of great Use, the Chief Justice desired to speak largely.

First, If Tenant to the *Præcipe* vouches Tenant in Tail in Possession, and him in Remainder jointly, and they jointly vouch over the Common Vouchee, this is good; not but it may be more regular that the Tenant vouch **Mary Bryant*, and she *Elizabeth*, and she over the Common Vouchee, that the Recovery in Value may not be joint but enure severally; yet the other Way is sufficient, for where in an Adversary Action a *Præcipe* is brought against several, it is enough that one hath the Tenancy of the Land; and if he would plead that he is sole Tenant, and traverse

If Tenant in Tail in Possession, and he in Remainder be vouched jointly, and they vouch over the Common Vouchee, this is good.

*P. 180

verſe that the other hath any Thing, the Demandant may admit that, and proceed as to him, and the Writ ſhall only abate as to the reſt. Alſo the others may diſclaim; and as joining a Stranger with the Tenant does not hurt, ſo joining a Stranger with the Vouchee, does not; for he is but *in loco Tenentis*, a Tenant to the Warranty.

If Tenant to the *Præcipe* vouches a Stranger, and he vouches Tenant in Tail, and he the Common Vouchee, that is good.

Secondly, If Tenant in Tail makes a Tenant to the *Præcipe*, and he vouches a Stranger, and the Stranger vouches Tenant in Tail, and he the Common Veuchee, that is good; for his * being a Stranger is not material; becauſe, in Judgment of Law, he is become Tenant by the Voucher to the *Præcipe*, and a Releaſe to him is good, and the Voucher is good, whether there be a real Warranty or no. At Common Law, if a Stranger was vouched, the Demandant could not counter-plead it; but by *Weſtm.* 1. *c.* 40. he may if he be abſent counterplead the Voucher, *ſcil.* that the Vouchee and his Anceſtors,

*P. 181

2 Inſt. 244.

Anceſtors, never had any Thing in the Land, but not if he be preſent. It is enough that Tenant in Tail comes in and owns a Warranty; but there may be a Warranty. Suppoſe an Adverſary Action aginſt Tenant in Tail, who has a Warranty, and he makes a Feoffment in Fee, with Warranty, or has levied a Fine with Warranty, and the Feoffee or Conuſee vouch the Tenant in Tail, he may make Uſe of his Warranty, and yet he was not ſeiſed of the Eſtate Tail, but in that Caſe may deraign the War-
*ranty, and then he recovers in Recom- *P. 182
pence as of his Eſtate Tail; for whenever Tenant in Tail comes in as Vouchee, he comes in in Privity of all Eſtates he ever had, and conſequently he may deraign the Warranty. *Vide* 1 *Inſt.* 385. *a.* Secondly, The Chief Juſtice ſaid, the Vouchee's being a Stranger was not material, becauſe, though there be no real Warranty, the Recovery in Value is the ſame, and the Admittance of Tenant in Tail has made it Real.

Tenant in Tail coming in as Vouchee, comes in in Privity of all Eſtates he ever had.

Objection:

See Cro. Eliz. 670. 3 Rep. 6. b.

Objection: The Recovery in Value muſt be joint, as the Voucher is, and then it will not enure according to the Eſtates which are ſeveral. As to the ſecond Point, the Caſe ſtands thus: Tenant in Tail, and he in Remainder in Tail join in making a Tenant to the *Præcipe*, and are jointly vouched, and jointly vouch over the Common Vouchee. Now my Brother *Hooper* objected, that the Tenant in Tail, and he in the Remainder ought to * have been vouched ſeverally, *viz.* Tenant in Tail firſt, and he have vouched over the Remainder-Man in Tail; for as that is, *viz.* as the Voucher was joint, the Recovery in Value muſt be joint; and ſo the Tenant in Tail, and he in the Remainder muſt recover Moities in Value; whereas the whole was recovered againſt the Tenant in Tail, and conſequently to bind the Iſſue, he ought to recover in Value the whole, and conſequently the Recovery in Value not being proportionable to the Loſs, the Common Recovery

*P. 183

is not good; but if it had been in the other Way, he would have recovered the whole in Value.

In order to anſwer that Objection, he ſaid he would conſider three Things, the ſecond was by Way of Preparation and narrowing of the Point in Queſtion, which would be the third; and he ſaid that he was the larger upon this Matter, becauſe it was of a greater Conſequence.

* The firſt Thing (he ſaid) was, That if a *Præcipe* was brought againſt Tenant in Tail in Poſſeſſion, and a Stranger in an Adverſary Action, and a Recovery was had, that this would be a good Recovery: He ſaid, that what he ſaid was the Opinion of us all; he ſaid, that indeed, the iſſue in Tail might falſify if there was any feint Pleader; and the Reaſon of the firſt Poſition, he ſaid, was, becauſe where a *Præcipe* was brought againſt ſeveral Perſons, it was

* P. 184

Where a *Præcipe* is brought againſt ſeveral Perſons it is not neceſſary that they all ſhould be Tenants of the Freehold, but if any of them are Tenants to the *Præcipe* it is ſufficient, in an Adverſary real Action.

not neceſſary that they all ſhould be Tenants of the Freehold, but if any of them were Tenants to the *Præcipe*, it was ſufficient; for if the Tenant in Tail would come in and take the Tenancy upon him, the joining of a Stranger with him in the Writ, would not have abated it, but the Demandant might admit the Tenant in Tail ſole Tenant, and go on againſt him, and that would be good; and the Diverſities in the Books, he ſaid, were,

*P. 185 * that in a *Præcipe*, *&c.* if one Diſclaim'd, or made Default after Default, or ſaid nothing, and the other took the whole Tenancy upon him, and pleaded in Bar, *&c.* the Demandant may accept him for his Tenant, and anſwer to the Bar; but if both take the whole Tenancy upon them, or ſeveral Tenancies of Parcel, the Demandant muſt of Force maintain his Writ; and for that he cited, among other Books, which I could not take, *Bro.* Tit. *Several Tenancy*, 13 *E.* 4. 2 *H.* 4. 22 *H.* 6. 55. 41 *E.*

21 E. 3. 10.
42 E. 3. 8.
44 E. 3. 33.
19 H. 6. 14.
28 Aſſ. pl. 25.
13 Aſſ. pl. 27.
Dyer 134. pl. 11.

41 *E.* 3. 20. and brought many Authorities to prove it. *Br.* & *Fitz.* Tit. *Maintenance de Brief.* And the Form of *Pleading*, in theſe Caſes, he ſaid, might be ſeen, *Raſt.* 276. And if bringing a *Præcipe* againſt Tenant in Tail and a Stranger would not vitiate a Recovery, then of Conſequence neither will a Joint Voucher; for by the Voucher, when the Vouchee comes in and enters into the Warranty, he is * as much Tenant in Law to the Writ, as if the *Præcipe* had been brought againſt him. And ſo the Caſe of a Stranger, being vouched jointly with him that has the Intereſt, will not differ from the Caſe of a Stranger being made Tenant in the Writ with the Real Tenant. *2dly*, There is another Reaſon why ſuch a Recovery will be good, *viz.* becauſe the Matter that makes the Writ abatable, will not avoid it, if it be not pleaded in Abatement: As if a *Præcipe* be brought a-

And if a *Præcipe* be againſt Tenant and a Stranger it will not vitiate a Recovery, conſequently neither will a Joint Voucher.

* P. 186

If a *Præcipe* be againſt one Joint-Tenant without his Companion, he may plead in Abatement, and the Writ ſhall abate; but if he plead in Chief, and a Recovery be had againſt him, it will be good for a Moiety only.

gainſt one Jointenant, leaving out his Companion, if he plead the Jointenancy in Abatement, the Writ will abate; but if he plead in Chief, &c. and a Recovery be had againſt him, it will be good for a Moiety; and as to that, it is the very Caſe of the Marquis of *Wincheſter*, 3 *Co.* 3. *a. b.* where Baron and Feme Jointenants for Life, Remainder in Tail to the Baron, a *Præcipe* was brought againſt the Baron only,
*P. 187 *and he vouched the Common Vouchee; and *reſolved*, that though as well the Tenant as the Vouchee might have abated the Writ, yet when they, by appearing *gratis*, admit the Writ good, and the Recovery is had againſt them, it is a good Bar to the Eſtate Tail for a Moiety; but as to the other Moiety, it is no Bar, becauſe there was no Tenant to the *Præcipe* as to that, and ſo the Recovery operates only by Eſtoppel, which will not bind the Iſſue in Tail; ſo here, this being only Matter of Abatement, there being no Advantage taken

taken of it, the Recovery will be good. If a *Præcipe* againſt Tenant in Tail and a Stranger were good, a Voucher of Tenant in Tail and a Stranger, would be good too; becauſe the Vouchee is Tenant in Law to the Writ.

The ſecond Thing he ſaid was, that ſuppoſe Tenant in Tail made a Tenant to the *Præcipe*, and a *Præcipe* was brought againſt Tenant to the *Præcipe*, * and he vouched a Stanger, who vouches Tenant in Tail, and he vouched over the Common Vouchee, that this would be a good Recovery; and that for theſe Reaſons: *Firſt*, Suppoſe it an Adverſary Action, if a *Præcipe* were brought at Common Law againſt *J. S.* and he vouched a Stranger, who never had any Thing in the Land, there was no Remedy for it; for the Demandant could not counter-plead the Voucher, till the Stat. of *W.* 1. *c.* 40. And this

Tenant in Tail makes a Tenant to the *Præcipe* who vouches a Stranger and he vouches the Tenant in Tail, who vouches over the Common Vouchee, this is a good Recovery.

* P. 188

The Stat. of W. 1. c. 40. gave the Demandant the Counterplea of Voucher to prevent infinite delay, which was occaſioned by the Tenant of the Land vouching Strangers who never had any Thing in the Land, by which they might have enfeoffed the Tenant or his Anceſtors.

was

was a very great Inconveniency; for when a *Præcipe* was brought againſt the Tenant of the Land, he might vouch a Stranger, and ſo his Vouchee might, and ſo on *in infinitum*, which was an endleſs delay; and ſo that Stat. gave the Counterplea, that the Vouchee, nor his Anceſtors were ever ſeiſed of the Thing in Demand, by which they might have enfeoffed the Tenant or his Anceſtors; but with this Exception, unleſs the Warrantor were preſent, *P. 189* * and would *gratis* enter into the Warranty; but if the Vouchee be abſent, the Demandant may counterplead the Voucher, as before, becauſe there will be a Delay to the Demandant by the *Præcipe*, which muſt go againſt the Vouchee; and in Common Recoveries, to avoid Exceptions, the Vouchee is generally † preſent. If a Stranger be a good

† Preſent] When the Recovery is paſſed at the Bar the Vouchee is preſent either in his own perſon, or by his Attorney, whom he has appointed in his Place by Virtue of a *Dedimus Poteſtatem* iſſued under the Great Seal, impowering Commiſſioners to take his Warrant of Attorney, which is returned into Chancery, and from thence ſent to the Common Pleas by *Mittimus* and *Tranſcript* to be there recorded upon the Roll wherein the Recovery is entred.

Vouchee

Vouchee, then ſecondly, he is Tenant to the Writ, and pleads to the Right, *et defendit jus ſuum quando*, &c. and a Releaſe to him by the Demandant, after he has enter'd into the Warranty, is good, and the Vouchee may plead it after the laſt Continuance, and it is as good as if it had been made to the Tenant himſelf; and it is not material whether there was any real Warranty 'twixt the Tenant and the Vouchee; but when that has been once admitted upon Record, ſince there might have been a Warranty between them, it is all one as if there had been; and this * might be collected from the Caſes of Common Recoveries, 3 *Co.* if they were obſerved. If Tenant in Tail is diſſeiſed, and a *Præcipe* is brought againſt the Diſſeiſor who vouches Diſſeiſee; that will bar the Eſtate Tail, &c. and yet here is no Warranty between the Diſſeiſor and Tenant in Tail; for though there was none, yet ſeeing Diſſeiſee comes in in Right of the Intail.

Co. Lit. 265. b.

* P. 190

If Tenant in Tail be diſſeiſed, and a *Præcipe* is brought againſt the diſſeiſor who vouches the Diſſeiſee, that will bar the Eſtate Tail, becauſe the

there

there might have been one, for the Diſſeiſee might have releaſed to the Diſſeiſor, with Warranty, now it is admitted on Record, it is all one as if there had been a Warranty; and the Diſſeiſee Tenant in Tail coming in, in Right of the Intail, the Eſtate Tail, &c. is barred: I ſuppoſe this to be an Adverſe Action. Tenant in Tail with Warranty makes a Feoffment in Fee with Warranty, or levies a Fine; the Tenant in Tail can never have his Eſtate Tail again, againſt his own Feoffment, &c. But yet if a *Præcipe* be brought againſt the Feoffee or Conuſee, who * vouches Tenant in Tail, and he the Common Vouchee, the Tenant in Tail ſhall recover an Eſtate Tail, though he has parted with his Eſtate, and ſhall make Uſe of the Recovery againſt him to deraign the Warranty Paramount; and the Reaſon is, becauſe all the while there might have been a Warranty, and it is ſuppoſed in the Recovery; and ſo where a Stranger is vouched, and

If Feoffee with Warranty of Tenant in Tail * P. 191 vouch the Tenant in Tail, and he the Common Vouchee, the Tenant in Tail ſhall recover an Eſtate Tail though he has parted with his Eſtate by the Feoffment or Fine, and by the Recovery ſhall deraign the Warranty Paramount.

and vouches over Tenant in Tail, and he over the Common Vouchee, that will be good, becauſe there might have been ſuch real Warranties. Feoffee with warranty to him, his Heirs and Aſſigns, makes a Gift in Tail, the Remainder in Fee, the Donee makes a Feoffment in Fee, the Feoffee ſhall not vouch as Aſſignee, becauſe he comes not in Privity of Eſtate; and ſo is 1 *Inſt.* 385. But if in that Caſe the Feoffment of the Tenant in Tail had been with Warranty, if he had been vouched he might have deraigned the * Warranty Paramount. If Tenant in Tail be attainted of Treaſon, and the King grants the Land to *J. S.* who bargains and ſells to *B.* againſt whom the *Præcipe* is brought, and he vouches *J. S.* and he vouches over the Common Vouchee; that ſhall not bar the Remainders; for *J. S.* does not come in in Privity of the Eſtate Tail; and ſo

* P. 192

2 Rol. Abr. 384. B. 3. Tenant in Tail is attainted, the King grants to *J. S.* who bargains and ſells to *B.* againſt whom a *Præcipe* is brought, and he vouches the Common Vouchee, that ſhall not bar the Remainders; but if the Patentee had vouched the next Remainder-Man, that had been a Bar to all the Remainders.

none of the Remainders could be affected by the Warranty; but suppose the Patentee had vouched the next Remainder-Man; that had been a Bar to all the Remainders, because he in the next Remainder that was vouched, came in, in Privity of the Estate Tail; and this is warranted by the Case put in *Cuppledike*'s Case, 3 *Coke* 6. *a.* That if *A.* be Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, *A.* makes a Feoffment in Fee, the Feoffee suffers a Common Recovery, in which *B.* is vouched, and he vouches over the Com-
*P. 193 * mon Vouchee; in this the Estate Tail of *A.* is not barred, but *B.* and all the Remainders over are barred: And so, by the same Reason, if the Patentee had vouched him in the next Remainder, in that Case in *Rolle*, the Common Recovery had been a Bar. But it is objected, that the Vouchee had nothing in the Land; but to that I answer, that he has entred into the Warranty, and by

that has ſubjected his own Heir to render the Value, and the Tenant in Tail who was vouched, comes in in Privity of the Eſtate Tail, as much as where the Tenant in Tail has made a Feoffment, or been diſſeiſed, and during the Diſſeiſin, &c. is vouched; and it is no Objection that there was no real Warranty in *D.* the Stranger and Tenant in Tail; for if that were a ſufficient Objection, it would over-turn all the Recoveries, and conſequently unſettle all the Eſtates in *England*; but the Warranty is admitted upon Record, and being ſo *admitted between Perſons that were ca- *P. 194
pable of having made ſuch a Warranty, it is all one as if there had been really and in Fact ſuch a Warranty; but then it is made a Queſtion, what Eſtate the Stranger ſhall recover in Value; and to that I anſwer, that he ſhall recover a Fee-ſimple; for the Tenant in Tail and his Heirs are eſtopped by the Record to ſay that the Stranger had not any Eſtate in the Land; and if they cannot aſſign

any ſpecial Eſtate, that he had not a Fee-ſimple, and this Eſtoppel will be of Avail, for it does not affect the Eſtate Tail, but the Aſſets in the Fee-ſimple. I have mentioned this Matter, becauſe it may be of very good Uſe to have Recoveries in this Manner, for thoſe that purchaſe an Eſtate of a Family may have a very good Title upon the Foot of one Settlement; yet there may be latent Settlements in the Family, and ſo it is the wiſeſt Way for a Purchaſor to bring in as many of the Family as * he can, and vouch them all. To the Third, which was the ſecond great Point, he ſaid that the great Difficulty of it was upon the Account that the Recovery in Value muſt not be proportionable to the Loſs; for by the Joint Voucher, the Recovery in Value muſt be Joint; whereas the Vouchees were Tenants in Tail of the whole, the one in Poſſeſſion, the other in Remainder; and this indeed would be a great Objection, if the Caſe were conſidered upon

Where there may be latent Family Settlements it is the wiſeſt Way for a Purchaſor to have as many of the Family vouched in a Recovery as he can.

* P. 195

Whether the Recovery in Value muſt not be proportionable to the Loſs.

upon the Foot of the Eſtoppel, for the Tenant in Tail will be eſtopped during his Life, to claim any more than a Moiety of the Recompence in Value; but then after his Death the Iſſue in Tail will not be eſtopped, but may ſay that the other was Tenant in Tail in Remainder, had not any Eſtate in Poſſeſſion in the Land, ſo the Recompence will enure to him alone; and there is no Difference between this Caſe and the Caſe of *Eare* verſus *Snow* * in *Plow.* 514. where the Huſband was Tenant in Tail of Lands, and a *Præcipe* was brought againſt him and his Wife, and they vouched over the Common Vouchee, and the Recovery was held to be good; for there it was objected that the Recompence in Value, which was the Cauſe of the Bar, ſhould by the ſurviving of the Wife go to her by Concluſion, and ſo no Reaſon to bar the Iſſue in Tail; but it was held that the Iſſue in Tail ſhould not be bound by any Eſtoppel, which his Father

* P. 196

ther admitted by joining in Voucher with his Wife, any more for the Recompence in Value, than he ſhould be by an Eſtoppel made by his Father, for the old Intail Land which is recovered againſt his Father, but was abatable againſt the Wife, to ſay that ſhe had loſt Nothing, and that his Father was ſole Tenant in Tail, and ſhe had Nothing. *Cro. El.* 376. *b.* and that he being the Perſon that had loſt the
*P. 197 * whole, ſhould have the whole Recompence, and that of the ſame Eſtate that he had loſt, and the Feme ſhould have Nothing. There was a Caſe in *Trin.* 1657. *Rot.* 179 *or* 180. between *Murrell* and *Osburn*, a Report of which I have under my Lord Chief Juſtice *Bridgman*'s own Hand in a Manuſcript I have of his, where this very Point came in Queſtion. My Lord Ch. Juſt. *Bridgman* was a very ſtudious Gentleman, and though he kept to his Chambers, yet he had an Account brought him of all that paſt in the Courts. The

Caſe

Caſe was in a *Formedon* in Remainder expectant upon an Eſtate Tail; the Tenant in Tail pleads in Bar a Common Recovery on a *Præcipe* againſt the Grantee of Tenant in Tail, in which Tenant in Tail and a Stranger were jointly vouched, and vouched over the Common Vouchee; and it was reſolved that this was a good Recovery, and bound all the Remainders: And *Bridgman* men-
* tions the Caſe 22 *H.* 8. *Br. Recovery in Value* 27. is to the ſame Purpoſe; there the Feme was Tenant in Tail, and a *Præcipe* was brought againſt Baron and Feme, and they vouched over the Common Vouchee, and the Eſtate Tail was held to be barred; and there it is held, that though the Huſband ſurvived, yet the Recovery ſhall bind the Iſſue in Tail; for the Recompence ſhall go as where the Land recovered ſhould have gone; this is full to the Point; for the Huſband is as much a Stranger to the Wife's Eſtate Tail as any Body; and ſo in *Eare* and *Snow*'s Caſe, is the Wife

Tenant in Tail and a Stranger were jointly vouched, and vouched over the Common Vouchee, this was a good Recovery.

* P. 198

The Recompence ſhall go as the Land recovered ſhould have gone.

to

to the Huſband's; and the only Diverſity between the two Caſes is, that in the Caſe in *Br.* the Husband muſt be named, but in that in *Plow.* the Wife need not. He ſaid there was Caſe adjudged in the late Times in this Court, *Lockyer* and *Palfreman*, *Hill.* 1651. which was reported obſcurely in *Style* 319. but he had a Report of it in the ſame Book *P. 199* of my Lord *Bridgman*'s, where Huſband and Wife were ſeiſed of a Reverſion in Fee expectant upon an Eſtate for Life, and made a Feoffment in Fee to make a Tenant to the *Præcipe*, but that happened to be void, becauſe the Tenant for Life continued all the while in Poſſeſſion; but there a *Præcipe* was brought againſt the Feoffee, and he vouched the Husband and Wife, and they vouched over the Common Vouchee, and that was held to be good; for if a *Præcipe* be brought againſt a Stranger, and he vouches Tenant in Fee-ſimple, the Recovery is good againſt Tenant in Fee-

Cro. El. Webb. v. Neſt. 21.

Where Tenant in Fee being vouched is eſtopped, but the Iſſue in Tail is not.

Fee-ſimple by Eſtoppel; but the Reaſon why ſuch a Recovery is not good againſt the Iſſue in Tail is, becauſe the Eſtoppel as to him is not binding; and if a *Præcipe* be brought againſt Baron and Feme, or Baron and Feme come in as Vouchees, the Wife is as much eſtopped as if ſhe was a Feme Sole, and there is no Diverſity as to the Eſtoppel, * if Tenant in Fee-ſimple be Tenant to the *Præcipe*, or come in as Vouchee; and to that Purpoſe is the Caſe in 3 *Cro.* 21. where Tenant in Fee-ſimple expectant upon an Eſtate for Life bargained and ſold to *J. S.* againſt whom a *Præcipe* was brought, and he vouched the Tenant in Fee-ſimple, and the Recovery was held to be good againſt him in the Reverſion and his Heirs: He concluded with the Caſe in 1 *Inſt.* 376. 2 *Cr.* 318. that if the Heirs at Common Law and the Heir in Borough Engliſh be vouched, and

10 Co. *Mary Portington's* Caſe.

* P. 200

Heir at Common Law and Heir in Borough Engliſh are vouched and vouch over the Common Vouchee, the Heir in Borough Engliſh ſhall have the whole Recompence, and ſo of Heirs in Gavelkind.

vouch over the Common Vouchee, the Heir in Borough Engliſh ſhall have the whole Recompence in Value, becauſe he has all the Loſs, and ſo of the Heirs in Gavelkind, &c. and ſo in the Caſe of *Eare* and *Snow*, the Wife, though ſurviving, ſhall have nothing, but the Iſſue in Tail ſhall have the whole Recompence in Value, becauſe he loſt the whole; ſo here, though there * be a Joint Voucher, yet the Recompence in Value ſhall go only to the Iſſue of Tenant in Tail in Poſſeſſion, and ſo ſucceſſively; and conſequently the Common Recovery is a good Bar. Judgment was given for the Defendant.

So here is a Joint Voucher, yet the Recompence ſhall go only to the Iſſue of Tenant in Tail in Poſſeſſion.

*P. 201

Trin.

Trin. 6 *Annæ*, in the Court of Exchequer, in Ejectment.

Lanc. ſſ. *John Johnſon*, on the Demiſe of *John* Earl of *Angleſea*, and *Henrietta-Maria* his Wife, and Lady *Elizabeth Stanley*, Spinſter, Plaintiffs.

James Earl of *Derby*, and Others his Tenants, Defendants.

OF *inter alia* the Manor of *Lathom* and ſeveral thouſand Acres of Land in *Lathom*, and other Places * in the County of *Lancaſter*, on Not guilty pleaded on a Trial at *Lancaſter* Aſſizes, the Jury found ſeveral general Verdicts as to Parcels, and *inter alia* as to *Croſs-Hall* in *Lathom*, and all the Premiſſes, except the Reſidue of the Manor of *Lathom*, two thouſand Acres

* P. 202

of Land in *Lathom*, Parcel of the ſame Manor, the Manor of *Newburgh*, two hundred and fifty Acres of Land in *Newburgh* in *Lathom*, and *New Park* in *Lathom*: The Earl is found Not guilty; and as to the Particulars excepted, find a Special Verdict.

That *William* Earl of *Derby* was ſeiſed thereof in Fee, and being ſo ſeiſed, to the Intent that Sir *Thomas Leigh* and others might convey the ſame to Queen *Elizabeth*, her Heirs and Succeſſors, and that the Earl might accept from the Queen a Grant to the Earl and the Heirs Male of his Body, and for Default of ſuch Iſſue, to the Heirs Male of the Body of Sir *George Stan-*
*P. 203 * *ley*, formerly Lord *Strange*, and ſhould leave the Reverſion in the Crown, enfeoffed the ſaid Sir *Thomas Leigh*, and others, and their Heirs.

And the ſaid Feoffees, being by Virtue thereof ſeiſed in Fee, did, in Purſuance of the ſaid Intent, by Deed inrolled convey the ſame the Eighth of *December*

December 43 *Eliz.* to the Queen, her Heirs and Succeſſors.

That Queen *Elizabeth* in further Purſuance of the ſame Intention, the Seventh of *January*, by her Letters Patent, for divers good Cauſes and Conſiderations the Queen ſpecially moving, and at the Petition of the ſaid Earl, conveyed the ſame to the ſaid *William* Earl of *Derby*, and the Heirs Male of his Body; and for Default of ſuch Iſſue, to the Heirs Male of the Body of the ſaid Sir *George Stanley*, to be held of the Queen, her Heirs and Succeſſors, by the Service of one Knight's Fee.

* That an Act of Parliament was made * P. 204
the Eighteenth of *November* 4 *Jac.* 1. whereby it was enacted, 'That the 'ſaid *William* Earl of *Derby*, and the 'Heirs Male of his Body, and in De-'fault of ſuch Iſſue, then the Heirs 'Male of the Body of the ſaid Sir '*George Stanley*, ſhould enjoy the laſt 'mentioned Premiſſes, and that the 'King ſhould hold ſuch Eſtate, Right,

'Title,

'Title, Intereſt and Reverſion, as if the 'Act had not been made.'

That the ſaid Reverſion deſcended from the ſaid Queen to King *James* I. and that the ſaid Reverſion deſcended from him to King *Charles* I.

That King *Charles* I. the Eleventh of *July* in the Eleventh Year of his Reign, made an Award under his Privy Seal, That *William* Earl of *Derby*, and *James* Lord *Strange*, ſhould grant a Rent-Charge of 600 *l.* a Year, out of an Eſtate of ſufficient Value, to *Charles Stanley* and the
*P. 205 Heirs Male of his * Body, and for Default of ſuch Iſſue to *James Stanley* and the Heirs Male of his Body.

That King *Charles* I. afterwards by Letters Patent the Third of *July* 13 *Car.* 1. reciting the Letters Patent of Queen *Elizabeth*, the Act of Parliament, and the Award, and to enable the ſaid *James* Lord *Strange* to perform the Award, granted the Reverſion to the ſaid *James* Lord *Strange* and his Heirs, to be holden by the ſame Services.

The

The King by the ſame Letters Patent willed and declared, that the ſaid *James* Lord *Strange*, within a Year after the Date thereof, ſhould cauſe the Reverſion to be granted or limited, that the Lands, &c. ſhould revert to the King in the ſame Manner as if the Letters Patent had not been made, chargeable nevertheleſs with a Rent-charge.

The Eleventh of *Auguſt* 13 *Car.* 1. for Performance of that Award, by Indenture inrolled in Chancery, the * ſaid Earl of *Derby*, and *James* Lord *Strange*, covenanted to convey within two Years the ſame Premiſſes by Fine, to the Intent the Rent-charge might be paid according to the Award, and that the Premiſſes in Queſtion ſhould go chargeable therewith to the Uſe of the ſaid *William* Earl of *Derby* and the Heirs Male of his Body; and for Default of ſuch Iſſue, to the Heirs Male of the Body of Sir *George Stanley* Lord *Strange*; and for Default of ſuch Iſſue, to the Uſe of *James* Lord *Strange*, his Heirs and Aſſigns.

* P. 206

Twenty-firſt of *Auguſt* 15 *Car.* 1. a Fine was levied of the Manor of *Lathom* to the Uſes in the Covenant; and there were Proclamations thereupon.

That neither *James* Lord *Strange*, nor his Heirs or Aſſigns, did within one Year convey the Reverſion, ſo as the Premiſſes might revert.

That Earl *William* was ſeiſed by Virtue of the Eſtate Tail, which deſcended *P. 207 * to the ſaid *James* Lord *Strange*, and afterwards to *Churles* Earl of *Derby*, and afterwards to *William-George-Richard* Earl of *Derby*.

That *William-George-Richard* being ſo ſeiſed in Tail, made an Indenture, bearing Date the Eighteenth of *Auguſt* 13 *W.* 3. and ſealed and delivered the Thirtieth of the ſame *Auguſt*.

The Indenture is found *in hæc Verba*, and appears to be a Bargain and Sale for a Year, from the Earl of *Derby* to *John Thornton* and *John Hayes*, of the Manor of *Lathom*, the Capital Meſſuage and Demeſne Lands, Park, Waſtes and Rents of or in the ſaid Manor, and all Lands

Lands and Hereditaments in *Lathom*, in the actual Tenure or Occupation of the ſaid Earl, and divers Lands and Hereditaments in other Places, in Poſſeſſion of ſeveral Tenants therein named.

That the ſaid *William-George-Richard* Earl of *Derby* made another Indenture, dated the Nineteenth of * *Auguſt*, but firſt ſealed by him the Thirtieth of *Auguſt*, the ſame Year. * P. 208

This Indenture is found *in hæc Verba*, and appears to be a Releaſe from the ſame Earl of the ſame Premiſſes to *Thornton* and *Hayes* and their Heirs, in order to make them Tenants to the *Præcipe*.

That at the Time of Sealing the two Indentures, there were blank Spaces left immediately after the Words *John Harrock*, in order to inſert the Names of other Tenants of Lands in the Towns mentioned in thoſe Indentures.

That a Writ of Entry was ſued out of the Manor of *Lathom*, &c. the Nineteenth of *Auguſt* 13 *W.* 3. returnable

the firſt Day of the next General Seſſion of Aſſizes at *Lancaſter*.

That the firſt Day of the next Aſſizes, (to wit) *Wedneſday* the Third Day of *September* 13 *W.* 3. the Writ was returned; the ſecond Day the Earl, who is vouched and ſummoned, ap-
*P. 209 * peared, and vouches the Common Vouchee, and thereupon a Recovery is ſuffered, and the Demandants have Judgment to recover Seiſin; and pray a Writ of Seiſin, returnable on *Monday* next in the ſame Seſſion.

That on *Friday* the Fifth of *September* the Spaces were filled up with the Names of ſeveral other Tenants of Lands in the ſame Manors and Towns, which Names were inſerted by the ſaid *Thornton*, Party to the Deeds.

The Jury further find that *William-George-Richard* Earl of *Derby* being ſo ſeiſed as aforeſaid, of the ſaid Reſidue of the ſaid Manor of *Lathom*, and the ſaid two thouſand Acres of Land in *Lathom*, the ſaid Manor of *Newburgh*,

two hundred and fifty Acres of Land, Parcel thereof in *Newburgh* in *Lathom*, of *New Park*, and of the Meſſuage and ſixty Acres in *Lathom*, called *New Park*, 2 *Auguſt* 29 *Car.* 2. in Conſideration of Five Shillings, made * a Bargain and Sale for a Year to *Heneage* Lord *Finch* and others of (*inter alia*) the ſaid Manor of *Newburgh* and *New Park* in *Lathom*.

* P. 210

That the Third of *Auguſt* the ſame Year, he made an Indenture of Releaſe of the ſame Premiſſes to the ſame Parties and their Heirs.

The Releaſe is found *in hæc Verba*, and is (*inter alia*) of the Manor of *Newburgh* and *New Park*, to hold the ſame to the Truſtees and their Heirs, to the Uſe of the Truſtees and their Heirs, during the Life of *Dorothea Helena* then Counteſs Dowager of *Derby*, in Truſt to pay her a Rent of 600 *l.* a Year Quarterly for her Life; and from and after her Deceaſe, then as to the Manor of *Newburgh* and *New Park*, to and for

the Uſes of ſuch Perſons, for ſuch Eſtates, and with ſuch Powers and with ſuch Remainders, as in and by the ſaid Act of Parliament of the Fourth of
*P. 211 King *James* I. is limited and * expreſſed, and in ſuch Sort and Manner as the ſame ſhould have gone, if this preſent Settlement had not been made; and the ſaid Earl covenants to levy a Fine to the Uſes in that Deed.

That a Fine was levied accordingly the Twentieth of *Auguſt* 30 *Car.* 2. with Proclamations of (*inter alia*) the Manor of *Newburgh* and *New Park* in *Lathom*.

That the Manor of *Newburgh* and two hundred and fifty Ares of Land, Part thereof, lye in *Lathom*; that *New Park*, at the Time of the Settlement, 29 *Car.* 2. was Parcel of the Manor of *Lathom*, and was ever ſince reputed Parcel thereof; but both *Newburgh* and *New Park*, at the Time of the Settlement, 29 *Car.* 2. and the Recovery 15 *W.* 3. were in the Poſſeſſion of *Dorothea*

rothea Helena, Counteſs Dowager of *Derby*, and the ſaid Lord *Finch* and others the Truſtees, at the ſame Time, * were ſeiſed thereof for the Life of the ſaid Counteſs Dowager. *P. 212

They find that *William* Earl of *Derby* had Iſſue *James*, who had Iſſue *Charles*, who had Iſſue *William-George-Richard*, who died without Iſſue Male 4 *Nov.* 1702.

That the Defendant Earl *James* is Heir Male of the Body of *Charles*, and younger Brother of the laſt Earl *William-George-Richard*, and Great Grandſon and Heir Male of the Body of the ſaid Earl *William*.

That the Leſſors, the Counteſs of *Angleſea* and Lady *Elizabeth Stanley*, are Daughters and Co-heirs of Earl *William-George-Richard*; that on his Death they entered and made the Leaſe to the Plaintiff *prout*, &c. and whether the Defendant the Earl be Guilty as to theſe, the Jury ſubmit to the Judgment of the Court.

Lord

Lord Chief Baron *Ward* was of Opinion with the Defendants, as to the
*P. 213 * Manor of *Lathom*, &c. on the Stat. 34 *H.* 8. which reſtrains Tenant in Tail of the Gift of the Crown from aliening, againſt the Opinion of the other three Barons, who held the Intail in this Caſe was a fraudulent Contrivance, not within the Meaning of this Statute. The Caſe on the Statute of Mortmain was cited, as it appears in *Farmer*'s Caſe, 3 *Co.* 78. *b.* and more largely in *Magdalen's College* Caſe, 11 *Co.* 73. *b.* 74.

As to the filling up the Blanks after the firſt Day of the Aſſizes, they all agreed, that being by Conſent of the Parties, though the Words inſerted might be void, it could not avoid the Deeds as to what was contained therein at the Time of Sealing; and beſides, the Deeds had then done their Office, and made a good Tenant to the *Præcipe* for the Manor of *Lathom*, and what was compriſed in the Deeds the firſt Day of the Aſſizes.

As

*As to *Newburgh* and *New Park*, *P. 214 Baron *Price* cited the Caſe 1 *Inſt.* 324. *b.* that if a Leaſe for Life was made, the Reverſion remains Parcel of the Manor, and paſſes with the Manor; which was not denied by any of the Barons, and ſeemed to be agreed by all; but they diſtinguiſhed this Caſe, as being by Deed and Fine, and held it therefore a Diſcontinuance and a Temporary Severance, during the Life of *Dorothea Helena*, Counteſs Dowager of *Derby*; and therefore the Recovery was void as to theſe, for want of a good Tenant to the *Præcipe*.

And purſuant to this Judgment in Ejectment, the whole Manor of *Lathom* (except *Newburgh* and *New Park*, and except *Croſhall*, which ſtood upon another Title) was adjudged for the Defendant, and therewith above 1000 *l.* *per Ann.* in Leaſes for Lives have been held and enjoyed under this Recovery ever ſince, as Parcel of the Manor wherein

P. 215 wherein the Intail was barred by this Recovery.

The Authorities for the Reverſions on Freehold Leaſes for Lives, remaining Parcel of the Manor, are very many, beſides 1 *Inſt.* 324. *b.*

18 E. 3. f. 39. 18 Aſſ. pl. 2. 38 H. 6. f. 38. *B.* and *F.* leaſe Part for Life, and then levy a Fine of the Manor, and the Reverſion paſſed.

Plowd. Com. 103. b. 2 And. 52. 1 Inſt. 324. b. The Diverſity, that after a Leaſe for Life of an Acre the Reverſion remains Parcel of the Manor, and paſſes therewith; but if the Manor be leaſed, except an Acre, the Acre is ſevered.

Fitz. Brev. 319. 38 H 6. f. 38. 5 Co. Ives's Caſe. 2 Leon. 221, & 281. So an Advowſon appendant granted for Life remains appendant, and paſſes with the Manor or Lands to which it is appendant.

Theloal's Digeſt of Writs, f. 37. *cap. un. droit deuxfois demande,* 2 *Roll. Abr.* 58. *Grant,* Y 1, 2, 120. 121. *Manor* D. 1 *Roll. Abr.* 633. *Diſcontinuance,* B. 5. 26 *Aſſ. Pl.* 55.

P. 216 And the Stat. 7 *H.* 8. *c.* 4. concerning Avowries for Rents and Services, ſeems

ſeems built on this Foundation, that ſuch Reverſions are compriſed and paſs in Recoveries as Parcel of Manors.

And it ſeems owing to the Diſuſe of Real Actions that this comes now to be queſtioned.

N. B. Upon the Death of *William-George-Richard* Earl of *Derby*, Mr. *Starkey* of *Preſton* was appointed by Earl *James*, and Mr. *Ward* by the Coheirs, to inſpect the Writings and adjuſt their reſpective Rights to the Eſtates of the deceaſed Earl; and this Point, *viz.* That the Reverſions on Leaſes for Lives paſſed by this Recovery as Parcel of the Manor, was agreed by them, and afterwards, upon a Reference to the Earls of *Pembroke*, *Rocheſter* and *Scarborough*, the ſame Point was admitted. And laſtly, after the Judgment given in the Exchequer, upon a Reference to Mr. *Richard Webb* and others, whereby at laſt * all remaining Diſputes were ſettled between the Heir Male of Earl *William* and the right Heirs of the late Earl *Wil-*

* P. 217

liam-George-Richard; All the Manor of *Lathom* in Poſſeſſion and Reverſion, except *Croſshall*, *Newburgh* and *New Park*, was awarded to the right Heirs, and the ſame have ſince been ſold and enjoyed accordingly.

And note; The Determination by the Barons in the Caſe of *Newburgh* and *New Park*, that the Fine in this Caſe made the Severance of theſe Parcels from the Manor, ſeems to imply that in other Caſes where there is no Fine, there is no Severance, but the Reverſion in Fee remains Parcel, and paſſes with the Manor according to the former Authorities.

* PRECEDENTS of Rules for Amending Fines and Recoveries.

* P. 218

Easter 34 *Car.* 2.

Between *Richard Tregeare*, Gent. Plaintiff, and *Nicholas Gennys*, Gent. Defendant. Wyrley.

Of Tenements with the Appurtenances in *Trewithicke Chapel Grounds*, *Chapel-Meadow*, *Hendra Meadow*, *Twinna Waies*, in the Parish of *Lanceston*, *St. Mary Magdalen la Witton*, and *St. Thomas the Apostle*, in the County of *Cornwall*.

16 *May*. FOrasmuch as it appears to the Court here, after the Examination as well of the Plaintiff and Comyns 387.

Deforcient, as upon the Inſpection and
*P. 219 *Examination of the Fine levied between the Parties aforeſaid, and the Indenture declaring the Uſes of the Fine, that by the Omiſſion or Miſpriſion of the Clerk, who made and ingroſſed the *Præcipe* and Concord of the ſame Fine, he ſuppoſed the ſaid Tenements to lie amongſt others in the Pariſh of *Lanceſton*, when in Fact there is no ſuch Pariſh within the whole County of *Cornwall*, but ought to be in the Pariſh of *St. Stephens* near *Lanceſton*; it is ordered by the Court, that as well the *Præcipe* and Writ of Covenant, as all Entries and Records of the ſaid Fine, in all Offices which it hath paſſed through, be amended and rectified by putting in the Words (*St. Stephens* near) as by Law it ought to be done.

By the Court.

Cooke.

Hilary

*Hillary 3 Annæ.

*P. 220

Courteney, Eſq; againſt *Blake* and his Wife.

Borrett.

12 *Feb.* UPON reading a former Rule of the Ninth Inſtant *February* in this Term, made between the ſaid Parties, and upon the Affidavit of *Nathaniel Lott*, it is ordered, that the Writ of Covenant in this Cauſe be amended by inſerting theſe Words (and *Knowſton*) in the aforeſaid Writ, and that all Entries and Proceſs made thereon be amended by the ſaid Writ, according to the ſame Rule.

On the Motion of Serj. *Hooper*.

By the Court.

Cooke.

Hillary

*P. 221 * *Hillary* 3 *Annæ.*

Borrett. *Courteney*, Eſq; againſt *Blake* and his Wife.

11 *Nov.* IT is ordered that the Deforcients, upon Notice of this Rule to them given, ſhew cauſe to this Court on *Tueſday* next why the Writ of Covenant in this Cauſe ſhould not be amended by inſerting therein (and *Knowſton*) and why all the Entries and Proceedings thereupon made out by the ſaid Writ ſhould not be amended.

By the Court.
Hooper.

The ſame againſt *the ſame.*

(To wit) *Feb.* 6 UPON reading a former Rule of 11 *Nov.* in the laſt Term made between the ſaid Parties,

* Parties, it is ordered that the Deforcients, upon Notice of this Rule to them given, ſhew Cauſe to this Court on *Monday* the laſt Day of this Term, why the Writ of Covenant in this Cauſe ſhould not be amended by inſerting (and *Knowſton*) and why all the Entries and Proceſſes thereupon made by the ſaid Writ ſhould not be amended according to the ſame Rule. * P. 222

By the Court

Mich. 13 *Car.* I.

Gulſtone.

Drake and *Another* againſt *Biddulph.*

Comyns 387. S. C. cited by the Name of *Broke* and *Others* v. *Biddulph.*

WHereas a certain Fine was proſecuted here in Court between *Anthony Biddulph*, Plaintiff, and *Anne Brown*, Widow, and *John Brown*, Deforcients, of two Meſſuages and one

 Garden,

P. 223 Garden, with the Appurtenances in the Pariſh of *St. Albans* in *Great Wood-ſtreet*, *London*, in the Term of *Eaſter* laſt, that a Recovery thereof might be had of the aforeſaid two Meſſuages and one Garden in the Term of the *Holy Trinity* laſt, and in the ſame Term the aforeſaid *Biddulph*, by the aforeſaid Fine being Tenant, appeared at the Bar here and vouched to Warranty the aforeſaid *John Brown*, Clerk; nevertheleſs the Prothonotary in his Remembrance wrote and entred the *Præcipe* and Recovery aforeſaid to be had of one Meſſuage and one Garden, and afterwards a Writ of Entry upon *Diſſeiſin in le poſt* was proſecuted of one Meſſuage and one Garden, according to the Entry in the Prothonotary's Remembrance, returnable in the *Octave* of the *Holy Trinity* in the ſame Term, where it ought to have been of two Meſſuages and one Garden, according to the ſaid Fine and Concord between the Parties aforeſaid, and the *P. 224* true Intention of them: Now upon the

the Affidavit of *George Almery* of the Truth of the Premisses, and the Examination thereof in Court, in the Presence of the Parties aforesaid, and by their Consent, it is ordered by the Court, 20 *Octob.* that the Cursitor of *London* amend the Writ of Entry aforesaid, and make it of two Messuages and one Garden; and that the Entry of the Recovery thereupon and other Process made out by the Clerk of the Prothonotary be likewise amended.

On the Motion of Serj. *Heath.*

Mich. 29 *Geo.* 2. C. B.

Between *Craghill* and *others* Plaintiffs, and *Pattinſon and his Wife*, and *Nicholſon and his Wife* and *others* Deforciants.

A Fine levied in Trinity Term in the firſt Year of his late Majeſty, was ordered by the Court to be amended according to the Deed to lead the Uſes thereof, by ſtriking out the Word (*parochiâ*) and inſerting the Word *(parochiis)* inſtead thereof, and alſo by inſerting the Words (*et Melmerby.*)

Nota; This Motion was made on the behalf of *John Nicholſon* claiming Title to Lands in *Melmerby* in *Cumberland*, under the ſaid Fine and Deed of Uſes, as Nephew and Heir of *John Nicholſon* one of

of the Deforciants; which was oppoſed by *Joſeph Carleton*, claiming Title to the ſame Lands (if not barred by the Fine) as Heir to *Mary* the Wife of the ſaid *John Nicholſon*, one of the Deforciants.

---

*P. 225. * *Hill.* 5 *Annæ.*

Cooke. Between *Edward Abney*, Kt. and *William Longueville*, Eſq; Plaintiffs, and *Henry* Earl of *Clarendon* and *Edward Hyde*, Eſq; Son and Heir apparent of the ſame Earl, Deforciants; and between *Anthony Heck*, Gent. Demandant, *Edward Abney*, Kt. and *William Longueville*, Eſq; Tenants; *Edward Hyde*, Eſq; Son and Heir apparent of *Henry* Earl of *Clarendon*, Vouchee.

Of Tenements in *Laverſtoake*, *Pitton*, *Weſtgrimſtead*, *Alderbury*, *St. Martins Winterborne*, *Earles* and *Pirton*, otherwiſe *Purton*, otherwiſe *Puriton*, in the County of *Wilts*.

11 *Feb.* FOraſmuch as it appears to the Court here, upon the Inſpec-

* Inſpection of a certain Indenture tripartite brought here into Court, bearing Date the Seventh Day of *February* in the Thirty-fifth Year of the Reign of the late King *Charles* II. made between the aforeſaid *Henry* Earl of *Clarendon* and *Henry Hyde*, Eſq; of the firſt Part, the aforeſaid *Edward Abney*, Knt. and *William Longueville*, Eſq; of the ſecond Part, and the aforeſaid *Anthony Heck* of the third Part, for declaring the Uſes of the ſaid Fine and Recovery, that the Names of the Places called *Clarendon* and *Clarendon Park* in the ſaid Indenture mentioned, in which lies great Part of the Lands and Tenements agreed by the ſame Indenture to be compriſed in the ſame Fine and Recovery, were omitted out of the ſaid Fine and Recovery, by the Miſpriſion of the Clerk who proſecuted the ſaid

* P. 226

In Eaſter Term 24 G. 2. It was moved that a Common Recovery which was ſuffered about nine Years before might be amended, by inſerting the Word (Trul) the Name of a *Vill* in it's proper Place according to the Deed to lead the Uſes thereof. The Word (Trul) had by Miſtake been inſerted in the Recovery as the *Name* of an Advowſon, not as a Vill where the Lands laid. The Court ordered the ſame to be amend-

ed accordingly by the Deed to lead the Uſes. Between *Loggin* Demandant, *Rawlins* Tenant, *Pullen* and his Wife Vouchees. *Nota*; The Eſtate whereof this Recovery was ſuffered, was in Truſtees at the Time of the ſuffering thereof, who were not Parties thereto, nor to the Deed of Uſes. See 2 Barnes 21, 22. S. C.

Fine of the Octave of the Purification in the Term of *St. Hillary* in the above-ſaid Thirty-fifth Year, and the ſaid Recovery of the Term of *Eaſter* in that ſame Year; and alſo upon reading divers Rules formerly made by the Court here, for adding the Names of Places omitted in divers Fines and Recoveries, it is ordered by the Court that the Curſitor of the County of *Wilts* amend the Writs of Covenant and Entry between the Parties aforeſaid, by inſerting in the ſaid Writs, next after the Word *Puriton*, theſe Words (*Clarendon* and *Clarendon Park*), and alſo that all Parts of the ſaid Fine between the Parties aforeſaid, and the Recovery aforeſaid, and the Exemplification thereof, and the Writ of Seiſin between the

*P. 227

In Michaelmas Term 25 Geo. 2. It was moved that a Recovery ſuffered in Eaſter Term 9 W. 3. Roll 195. between *Witton* Demandant, *Eaſt* and another Tenants, and *Fairfax* Vouchee of Lands in the County of the City of York, might be amended in the *prayer* of the *Seiſin*, and that the Return of the *Writ of Seiſin* might be made perfect by the Clerk of the Return Office, the proper Officer who makes the Return: This Writ being rightly directed to the Sheriffs of the City of York, but not returned in the Name of any Sheriff, tho' a miſtaken Return in the ſingular Number inſtead of the Plural, was indorſed on the Writ: The Prayer of Seiſin and the Return of the ſaid Writ were ordered to be firſt amended, and then the Roll and the Exemplification thereof accordingly. For the particular Amendments made and ſpecified in the Rule, See 2 Barnes 24, 25. S. C.

ſaid

ſaid Parties, be amended on Record, in the ſame aforeſaid Words (*Clarendon* and *Clarendon Park*) in all Places neceſſary.

On the Motion of Mr. Serj. *Broddrick* and *Cheſhire*.

By the Court.

Darby.

---

* *Mich.* 6 *Car.* I.

*P. 228

Skinner and *Others* againſt *Land.*

Gulſton.

WHereas in the Term of *St. Hilary* in the Fifth Year of King *Charles*, upon a Writ of Entry upon *Diſſeiſin in le poſt*, the Tenant vouched to Warranty *Arthur Gouldinge*, Gent. and *Anne* his Wife, of fifteen Acres of

Land and one Acre of Meadow, with the Appurtenances in *Alphamſton* and *Lamarſhe* in the County of *Eſſex*: Now upon Inſpection of the Feoffment made by the aforeſaid *Gouldinge* and his Wife to the ſaid Tenant, it appears that the aforeſaid Acre of Meadow lies in *Great Henney*, and not in *Lamarſhe*; and ſo the aforeſaid Writ of Entry was proſecuted, by the Miſpriſion of the Clerk, of Tenements in *Alphamſton* and *Lamarſhe*, and a Common * Recovery thereupon; and an Exemplification of the ſame was had, where it ſhould have been of Tenements in *Alphamſton* and *Great Henney*; therefore it is ordered by the Court, that the Curſitor of the County aforeſaid amend the Writ of Entry aforeſaid, and that the Name of the aforeſaid Village of *Lamarſhe* be expunged by him, and in the Place thereof the Name of the Village of *Great Henney* be inſerted; and that the Prothonotary's Clerk alſo amend the Entry of the Recovery aforeſaid, and the Exem-

* P. 229

Eaſter 22 G. 2. A Recovery was amended in the Judgment Part thereof by ſtriking out the Word (adjudged,) and inſerting the Word (conſidered,) 2 Barnes 19. and 23. S. P. this relating to the Act of the Court in giving their Judgment.

Exemplification thereof; and alſo the Writ of Seiſin proſecuted upon the Writ of Entry aforeſaid, according to the ſaid Writ of Entry aforeſaid ſo amended.

By the Court.

---

* *Trin.* 13 *Car.* I.

* P. 230

Wightwick and *Another* againſt *Maſters.*

Gulſton.

UPON Inſpection as well of a certain Indenture made between *Thomas Maſters*, Tenant, of the one Part, and *Humphrey Wightwick*, Gent. and *George Wightwick*, Gent. Demandants and *Lockley* Tenant: The Writ of Seiſin was teſted 2 *Die Junii anno* 13 *Georgii Regis* returnable *tres Trin.* The Return was thus, "*Virtute iſtius brevis mihi directi* 12 *Die Junii Anno infraſcripto habere feci Willielmo Watſon plenariam Seiſinam de acris infraſcriptis cum Pertinentiis prout interius mihi Præcipitur. Johannes Lock miles et Willielmus Ogborne miles Vicecomes Midleſexiæ.*" Now the Words *Anno infraſcripto*, refer to the *Teſte* of the Writ which was in the 13th *Year* of King George the Firſt, but the 12*th* of June in the Return was in the *firſt Year* of King George the Second: The Court upon reading the Writ and the Return, ordered the Year to be amended, as a Miſpriſion of the Clerk, without any Rule to ſhew Cauſe. H. 26 G. 2. *Ex relatione Wilſon Servientis ad legem.*

Comyns 387. S. C. cited.

Between *Watſon* Demandant

dants, of the other Part, ſhewn here in Court for declaring the Uſes of a Recovery here in Court, between the Parties aforeſaid, had in the Term of *St. Hilary* laſt paſt, and alſo upon the Cognizance of the aforeſaid *Thomas Maſters* then preſent here in Court, it is found that the Recovery had ſhould be of three Meſſuages, one Dove-houſe, four Gardens, eighty-ſix Acres of Land, twenty Acres of Meadow, and fifty Acres of Paſture, with the Appurtenances in *Sibington*, *Newchurch* and *Marſham* in the County of *Kent*; but upon
*P. 231 Oath of *William Codd*, one of * the Attornies of this Court now preſent here in Court, it appears, that as well in the Writ of Entry of that Recovery had in the aforeſaid Term of *St. Hilary*, as in the Writ of Seiſin thereupon alſo proſecuted, and in the Entry of the Recovery aforeſaid, the aforeſaid Word *Newchurch*, by the Negligence of the Clerk, was intirely omitted; now it is ordered by the Court, the twenty-firſt Day of *June* in this ſame Term, that as well the Writ of

Entry † as the Writ of Seiſin, and the Entry of that Recovery between the Parties aforeſaid of Record be amended, and the aforeſaid Word *Newchurch* in all of them be inſerted, and that as well the writs aforeſaid, as the Roll of the Entry of Recovery aforeſaid, be brought into Court here for the Purpoſes aforeſaid, and amended here in Court, without Delay in this Particular.

† The Court refuſed to amend the *Teſte* and *Return* of a Writ of Entry, becauſe there was no *Miſpriſion* of the Clerk, nor any Thing to amend by, the Curſitor having made the Writ agreeable to the Inſtructions. Between *Wynne* and another Demandant, *Thomas* Tenant, and *Apperly* and his Wife Vouchees by Attorney. Hill. 18 Geo. 2. See 2 Barnes 14, 15. S, C.

On the Motion of Mr. Serj. *Clarke*.

By the Court.

*P. 232 * *Mich.* 1650. 2 *Car.* 2.

Pinsent. Fine between *George Parker*, Esq; and *Thomas Jolley*, Plaintiffs, and *Charles Cotton*, Esq; and his Wife, Deforcients.

Fine from the Day of the *Holy Trinity*, in three Weeks, 1649.

Comyns 387. S. C. cited. UPON the separate Oaths of the aforesaid *George Parker* and *Charles Cotton* made here in Court, and by Consent of the same *Charles Cotton* present here in Court, it is ordered by the Court this 19 *Nov.* that the Name of the Village of *Waterfall*, by the Negligence of the Writer omitted, be put in as well in the Writ of Covenant as in certain other Parts of the aforesaid Fine.

On the Motion of Serj. *G. Clarke.*

By the Court.

Gardner.

TABULA.

TABULA.

CAPUT. I.

OF the Origin, Nature and Uſe of Common Recoveries. Page 1
Concerning the Origin of Eſtates Tail, if any among the *Romans* or *Jews*, invented by the Feodal Law, and were firſt introduced into *England* by the Conqueror. 2
All Eſtates at Common Law Fee-ſimple. Statute *de Donis* created Eſtates Tail; the Miſchief of theſe Eſtates, and the Reaſon of it. 5
What Reputation Eſtate Tail had ſeveral Ages. 6
Concerning the Origin of Common Recoveries, ſuppoſed by ſome to be begun by *Taltarum*'s Caſe

Caſe, but rather to ariſe from the Reaſons drawn from *Octavian Lombard*'s Caſe. Page 8, 9, 10

The Recompence in Value, the Reaſon of the Iſſue being barred, though only a Fiction, and this Fiction occaſioned the learned Cavils againſt Common Recoveries. 11, 12

Common Recoveries bar where no Recompence; as Tenant in Tail, Remainder for Years ſuffers a Recovery, Remainder barred, though Recompence cannot extend to a Chattel; ſo Tenant in Dower and contingent Remainders barred without a Recompence. 13, 14

Recompence in Value is the Reaſon for barring the Iſſue; but the Reaſon for barring Remainders is, Recoveror is in of the Eſtate Tail, which continues, and Common Recoveries a Conveyance excepted out of the Statute, and an inherent Privilege annexed to Eſtates Tail. 14

When Tenant in Tail is vouched, he comes in of the ſame Poſſeſſion he had before, and to warrant it; and when one enters into Warranty, the Law will always preſume there was one on Feoffment or Grant. 15, 16

Common Recoveries like Adverſary Recoveries, and ſuch Judgments, but Recoveries on Title cannot be to a Uſe, as Common Recoveries are. Recovery binds Blood and diſapproves the Title; though ſeveral Diſcontinuances after Recovery, Recoveror may enter; and though Reco-

TABULA.

Recoveries reflected on by ſome Statutes, countenanced by others. Page 17, 18, 19

The Uſe of Common Recoveries.

Common Recovery bars Iſſue, Remainders and Reverſions, and Recoveror comes in under Tenant in Tail, and is liable to all his Charges, and enlarges the Eſtate Tail; if he comes in as Vouchee, he comes in of all Eſtates; if he is Tenant to the *Præcipe*, only the Eſtate he then had is barred; for the Recompence extends not to *that* he had not. 20, 21, 22, 23

Where the Iſſue has no Recompence he is not barred, and therefore Recovery by Default without Voucher binds him not, but on Entry he is remitted; but *aliter* where he has or may have Aſſets and Recovery in Value. 23, 24

Are favoured, and Fine, Recovery and Deed to lead the Uſe are one Conveyance. 25, 26

Where Recovery is to be ſuffered by the Father on Marriage of his Son, it is ſafeſt to do it with treble Voucher. — 26, 27

CAPUT

TABULA.

CAPUT II.

OF the Tenant to the *Præcipe*.

The Reaſon why there muſt be a Tenant to the *Præcipe*; if there is none, the Iſſue in Tail may plead *Nient Tenant*. Page 28, 29

If there be a good Tenant before the Return of the Writ, it is good; if he were not Tenant at the Return, he might abate it by Plea of *Non-tenure*; but if he vouches, he admits the Writ, but Vouchee may counterplead the Tenancy; but if he does not, it is good againſt them all by Eſtoppel, but the Tenant recovers not in Value, becauſe he loſt Nothing. 29

If Tenant became Tenant after the Voucher, Judgment is given on the Voucher, not on the *Præcipe*, ſo binds. —— 30

In Common Recoveries if there be a good Tenant any Time before Judgment, it is good; and if he comes to the Land by his own Act, he cannot abate the Writ; *aliter* if by Act in Law, as Diſcent. —— 30, 31

If there is no Tenant, the Demandant cannot ſue Execution againſt him, nor he againſt Vouchee; and Eſtoppels, though of Record, bind not Iſſue in Tail; *aliter* of Tenant in Fee, a Recovery binds him, though no Tenant. 32, 33

If

TABULA.

If an Eſtranger that has Nothing is made Tenant with the true Tenant, it hurts not. Page 34

Leſſee for another's Life makes a Leaſe for Years, and died, and he in Remainder being Tenant in Tail ſuffers a Recovery, and void, for Freehold was in Leſſee for Years by Occupancy. 34

Huſband Tenant for Life, Remainder to Feme in Tail, *Præcipe* againſt both ill; ſo if there be Tenant for Life, Remainder in Tail. *Præcipe* againſt both ill; ſo againſt Mortgagor and Mortgagee, becauſe Land recovered in Value ſhall be in the ſame Degree as the Land loſt. 35

Lands given to Huſband and Wife, and the Heirs of the Body of Huſband, Remainder over, Huſband alone ſuffers a Recovery, it is no Bar; but if Huſband diſcontinues, and *Præcipe* againſt Diſcontinuee, and Huſband comes in as Vouchee, it is good to bar Baron, not Feme. —— 38, 39

Concerning Tenant to the *Præcipe* by Diſſeiſin. 40

Concerning Surrender by Tenant for Life to make a good Tenant to the *Præcipe*. If a Recovery be of a Manor, Part whereof is in Leaſe for Life, needs no Surrender; the Reaſon is this. —— 41, *&c.*

Surrender by Tenant for Life muſt be to him that has the Reverſion. —— 50

TABULA.

Term for Years hinders not Recovery; and by Statute of *Glouceſter*, Tenant for Years in *London*, may falſify. ——— Page 51

Fine levied, and a Writ of Entry againſt Conuſee, and no Uſe declared of the Fine, yet a good Recovery. ——— 52, 54

Statute of *Frauds* extends to Truſts, not to Uſes. 53

Recovery good without a Tenant to the *Præcipe*, where Party has a Fee. ——— 55

Tenant to the *Præcipe* may be made by Fine, Releaſe, Feoffment, Bargain and Sale inrolled, and though good before Inrolment, it is ſafeſt to inroll it before the Recovery ſuffered. 56

If Tenant to the *Præcipe* appear to be made by Releaſe dated after the Return of the Writ, * it is ill. Termor made Tenant to the *Præcipe*, extinguiſhes not his Term. Judges intend a Tenant to a *Præcipe* or Surrender, where Recovery of ten Years Standing. 57, 58, 59, 60.

* It was ill when the author wrote; but is now helped by the ſtat. 14 Geo. 2. c. 20.

CAPUT

TABULA.

CAPUT III.

WHO may ſuffer a Common Recovery. Infants cannot: Whereof the Privileges Infants have by Law. Page 60, 61

If an Infant ſuffers a Recovery, either in Perſon or by Attorney, it is erroneous, but by Guardian by Privy Seal it is good. 63, 64

Concerning the Diſability of Coverture. Of the antient form of Examination of a Feme Covert in a Recovery. ——— 66

Common Recovery by a Feme Covert, bars her Dower. ——— 66, 67

Lands given to Huſband and Wife, and the Heirs of the Body of the Huſband, he grants, a *Præcipe* againſt Grantee, the Huſband is vouched, and vouches over, bars the Intail, not the Wife: But if Lands are given to Huſband and Wife, and the Heirs of their Bodies, he diſcontinues and comes in as Vouchee, no Bar; ſo if Lands given to Huſband and Wife, and the Heirs of the Body of the Huſband, and *Præcipe* againſt him alone. 67, 68, 69

Lands given to Huſband and Wife, and the Heirs of their Bodies, *Præcipe* againſt them, and they vouch Common Vouchee, good; ſo if to Huſband and Wife, and the Heirs of the Bo-

dy of the Wife; but if it be to Husband for Life, Remainder to Wife in Tail, *Præcipe* against both ill. —— Page 70, 71

Husband and Wife Tenants in Special Tail before Marriage, Remainder to Husband in Tail Male, Remainder to *J. S.* in Fee, Baron grants, a *Præcipe* against Grantee, who vouches Baron; and doubted, if barred for a Moiety. 71

Concerning Recoveries by Ideots and Madmen. 72

An Office finding one an Ideot *a Nativitate*, who had before levied a Fine, set aside, and the Fine held good. —— 72, 73

Tenant in Tail attainted, disabled to suffer a Recovery. —— 73

Alien, where his Recovery bars the Estate Tail, and where not. —— 74

The King cannot suffer a Common Recovery. 74

Women Jointresses disabled to suffer Recoveries by Stat 11 *H.* 7. *c.* 20. 75, 76

Feoffment to the Use of a Man and his Wife, and the Heirs of their Bodies, Man dies, having Issue *B.* Feme is disseised, *B.* releases to Disseisor with Warranty, and has Issue *C.* and dies, Disseisor suffers a Common Recovery, and vouches Feme; this bars not *C.* 77

A Man seised in Fee marries, and has Issue a Son, his Wife dies, he marries again, and settles his Estate on himself, his Wife, and the Heirs of their Bodies, and dies; Mother and Son join in Recovery, bars the Heir. 77, 78

TABULA.

Lands ſettled on Baron and Feme in Tail, Baron dies, leaving a Daughter, Feme *enſeint* with a Son, Recovery by Wife and Daughter bars not the after born Son. Page 78, 79

If a Man ſettles Lands with his Daughter in Tail, in Conſideration of Money paid by the Huſband, it is out of the Act; but if the Land be ſold by Baron and Feme, and Lands purchaſed and ſettled, *aliter*. ——— 79, 80

Lands limited to a Man for Life, Remainder to his Wife in Tail, Remainder to a Stranger in Fee, out of this Act. ——— 80

If Huſband and Wife join, they may bar the Iſſue. 80, 81

Baron ſeiſed *jure ux'*, they levy a Fine, and Lands rendred to them in Special Tail, he dies, ſhe may by Fine bar the Iſſue. —— 81

If Land move from any Anceſtor of Baron within the Act. ——— 82

By this Statute Recoveries by Tenant for Life void. ——— 83 Stat. 32 H. 8. c. 31.

Recovery at Common Law by Tenant for Life, bars him in Remainder, becauſe the particular Eſtate and Remainder are but one Eſtate. 83, 84

Remainder veſted in the King cannot be diſcontinued or pulled out of the King by Common Recovery; and ſuch Remainder cannot be diveſted by Act of Party, but by Act in Law. 84, 85 Stat. 34 & 35 H. 8. c. 20.

If

TABULA.

If the King's Anceſtor, not being King, makes Gift in Tail, this is out of the Act; ſo if Subject created an Eſtate Tail, and Reverſion is granted to the King. If Tenant in Tail of the Gift of the King, make a Gift in Tail, the ſecond Donee not within this Act. Page 87, 88

If the King grant an Eſtate Tail and reſerve the Reverſion, and after he grants the Reverſion, Recovery good, and bars all. 88

Where the Reverſion is granted to the King for Life or Years, it may be barred; ſo wherever Reverſion is ſevered from the Crown, and Privity gone. ——— 89

Where King is Donor, and ſome little Alteration is made in the Intail by a private Act of Parliament, yet if Reverſion continues in the King, it cannot be barred. 89, 90

If the King procure a Subject to intail Lands on his Servant, and it appears on Record, it is within the Act. ——— 91

The Tenant in Tail muſt do or ſuffer, and bare Permiſſion not within the Act; ſo Nonclaim on a Fine. ——— 91, 92

Stat. 14 Eliz. c. 8. Hinders all Tenants for Life, in Poſſeſſion or Right, from ſuffering Recoveries, or to come in as Vouchees. ——— 92, 93

Stat. 14 Geo. 2. cap. 20. For Amendment of the Law concerning Common Recoveries. 27 Margin

CAPUT

TABULA.

CAPUT IV.

OF what Things a Common Recovery may be ſuffered, and what not. Page 96
Reputed Manor paſſeth Lands within a Liberty, and a Place known. 97, 98
Of a Rent, Penſion, &c.
If a Man have a Moiety or third Part of Lands, and ſuffer a Recovery of all, the Moiety or third Part paſſes. —— 99
How a Recovery is to be ſuffered of Copyhold Eſtates. —— 100, 102, 103, 104
Recovery of Lands in Antient Demeſne. 104
Recovery of a Truſt Eſtate good, without Tenant to the *Præcipe*. —— 104
Common Recoveries ſhall have a large and benign Conſtruction. 105, 106, 107

CAPUT V.

THE Differences between a Common Recovery with ſingle and with double Voucher. —— 108

TABULA.

If a Recovery be with ſingle Voucher, it is a good Bar of the Eſtate the Tenant in Tail was poſſeſſed of, but no otherwiſe; but if comes in as Vouchee, bars all Eſtates he ever had. Page 109, 110, 111, 112, &c.

The Iſſue in Tail can never be barred, but where there is a real or poſſible Recompence by Recovery in Value. —— 113

CAPUT VI.

WHAT is or is not barred by a Common Recovery. —— 117

Recovery enlarges the Eſtate Tail, and lets in all Tenant in Tail's Incumbrances. 119, 120, 121, &c.

Tenant in Dower, or Jointreſſes, who join in a Recovery, barred. —— 123

Tenant for Life, Remainder in Tail, he in Remainder leaſes to commence after the Death of Tenant for Life, and after Tenant for Life and Remainder-Man ſuffer a Recovery, the Leaſe is good. —— 124, 125

If Tenant in Tail grant a Rent or Leaſe, Recovery makes theſe good. 125

Com-

TABULA.

Common Recovery bars contingent Remainders. Page 125, 126, 127

Bars not executory Deviſes nor a ſpringing Uſe. 127

What an executory Deviſe is. 127

The difference between an executory Deviſe and a contingent Remainder. 128, 129, 130, 131, 132

Where there is no Eſtate Tail executed, Recovery bars not. —— 132, 133, 134

Bars not a Poſſibility or a contingent Executory Eſtate. —— 134, 135

If one who has an Eſtate for Life, with Power to make a Jointure, ſuffer a Recovery, his Power is extinguiſhed; *aliter* of a collateral Power to make Eſtates. —— 135, 136

Gift in Tail determinable on the Donee's paying 100 *l.* Remainder to *B.* in Tail, Tenant in Tail before Day of Payment ſuffers a Recovery, all barred. —— 136

Term ſubſequent to an Eſtate Tail, as to riſe, on Failure of Iſſue Male barrable; *aliter* if precedent Gift in Tail, rendring a Rent, the Rent not barred by a Common Recovery; but if Condition to re-enter, that barred. 136, 137, *&c.*

If Iſſue in Tail comes in by Title Paramount, Recovery bars not. —— 139

A Man ſeiſed *Jure Uxo'* for Life, Remainder in Tail to *B.* Remainder to *C.* Baron bargains and ſells, and *Præcipe* againſt Bargainee, who

vouches *B.* this bars the Intail and *C.* alſo. Page 140.
Lands limited to *B.* and his Heirs as long as ſuch a Tree ſtands, barrable by Recovery, if Tenant in Tail levies a Fine with Proclamations, though Intail extinct, ſubſequent Recovery good. —— —— 140
Bars a Remainder not *in Eſſe*, ſo contingent Remainders. —— —— 141

CAPUT VII.

OF Vouching and Recovery in Value. 142
Concerning Vouchers at Common Law, and Counterplea thereof. 144, 145
Where one may vouch himſelf. 145
Concerning Vouchers and Counterpleas in Adverſary Actions. 146, 147, 148, *&c.*
Concerning Vouchers in Common Recoveries. 151, 152

CAPUT

TABULA.

CAPUT VIII.

OF Execution and the Eſtate the Recoveror has by the Common Recovery. Page 153
No Uſe ariſes till Execution returned. 154
If Tenant in Tail dies before Execution, it may be ſued againſt his Iſſue. 154
Recovery lets in precedent incumbrances. 155
Recoverors have the ſame Remedy againſt Leſſees as Leſſors had before the Recovery ſuffered. 155, 156

CAPUT IX.

OF Falſifying Common Recoveries. 156
By what Ways a Recovery may be falſified. —— —— 156
Several Caſes of falſifying Adverſary Recoveries. 156, 157, 158, &c.
Iſſue in Tail ſhall never falſify in the Point tried. 163

Who

TABULA.

Who may Falsify upon Stat. 25 *H.* 8. *c.* 51. Page 164
For what Causes a Common Recovery may be falsified, and how. 165, 166

CAPUT X.

OF Errors in Common Recoveries, and in what Cases Recoveries and Fines may be amended. —— 167, *&c.*
Several Cases where Court has amended Common Recoveries and Fines, or helped them by a liberal Construction. 170, 171, 172, *&c. &c.*

FINIS.